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THE SHAREHOLDER'S APPRAISAL REMEDY: AN ESSAY FOR FRANK COKER*

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A DEAN of my acquaintance is fond of saying that every law school course should be a course in jurisprudence. No one ever put this precept into practice more fully than Frank Coker.

Somehow, as our mutual colleague Leon Lipson once observed, Frank's jurisprudence rode unusually close to the surface. Between his most specific statement and the most general philosophic premises underlying the statement there was a minimum of intermediate steps. And the few connecting links required were made to seem simple, even apparent. Frank's mind was elegant, in the sense that a great mathematical proof is elegant.

This intellectual faculty—or perhaps it was the product of other faculties—gave Frank unusual power. He was exquisitely sensitive to the radiating implications of a thought—looking outward to the impact it would have on other thoughts, and looking inward to the assumptions and sub-assumptions implicitly asserted by it. His mind was fully emancipated from the slavery of *a priori* categories and the curse of Platonic realities. I have never known anyone who so rigorously kept symbol separate from referent, or who was as constantly conscious of his own thinking apparatus. He possessed a species of mental fluidity, an ability to envelop a problem from all sides and levels at once with no apparent shifting of gears or conscious crossing of barriers. His antennae were delicately tuned for the detection and weighing of relevancy along any axis of choice, or several axes at once. To these gifts was added an awesome capacity for deliberation and main intellectual effort.

In consequence, Frank was never fooled by his own words; he was uncanny in his skill at spotting hokum; and no one ever found him in an ill considered position.

A final test for a new idea was to expose it to Frank's talents—if you were willing to subject the newborn defenseless thing to the merciless dissection that he would turn upon it. He inspected an idea with the same sustained intensity and acuity as that with which Louis Aggasiz is said to have inspected a bird or a fish. Whenever I put an idea through this testing process with Frank, and it was often in the years we taught courses jointly, the result was always

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the same. Some steps in the analysis that had seemed easy, or had not been identified as steps at all, were revealed as crucial and either doubtful or impossible. Other steps that had seemed difficult were made easy or, if their difficulty was confirmed, I learned much more of why they were difficult. And invariably some wholly new, and apparently very simple, insight would have been added to the problem as a whole—an insight revealing that the original problem was difficult because the wrong question was asked, or that the answer was hard because the problem could be proven internally insoluble, or that the answer was simple if worked out from another perspective or with another vocabulary. Consultation with Frank did not primarily produce extra information, or suggestions for research; it added new comprehension, new scales of proportion, new perceptions of relevancy, and new questions more interesting than the one with which one began.

Frank was not a Superman, and his qualities of mind raised many difficulties for him. Because he would not content himself with half-truths, he often had difficulty in expressing himself, in forcing himself to utter the stream of oversimplifications that are required for classroom use or publication. If one was only half-listening, Frank's thoughts sometimes sounded unorganized or even disorganized. It took time to learn that you should listen hardest when the organization seemed weakest. You should attend most closely when Frank seemed to skip a level, or shift off focus; these were precisely the points at which he was seeing relevancies that eluded others, was struggling to unify into a single meaningful simplicity what others saw as discrete and insignificant instances. This was the time to note and learn.

At times, Frank seemed more than unorganized in his thoughts; he seemed totally at sea. I have often heard him respond to a line of argument with only a gentle smile of humor and rue, and an apologetic shaking of the head. Pressed, he might say: "Something is wrong about it. Something comic. I do not know what it is, and I don't think I am going to know what it is for a long time, if ever. Maybe we can make progress if *you* try to tell *me* why I react this way here." He seemed able at will to divide himself in two, one part assigned to the job of reacting, the other to the job of describing and explaining the reaction. All of us who worked with him will always associate with Frank phrases like: "I cannot say why, but I can report that my reaction is X," and, "For some reason I am moved to respond with the statement Y, though as yet I cannot see how it is relevant." Strangers were tempted to dismiss this kind of freely associated statement from Coker as ill-thoughtout and useless, even exasperating.

But the baffled student or hurried lawyer who tossed off these responses from Frank was making a costly mistake, barbarous in undervaluing the fineness of what he had heard. Some of the enigmatic comments I heard from Frank Coker clarified over months, or years, of discussion. A few of them I have worked out for myself. Many of them are still enigmas, and with Frank gone, they are likely to remain permanently clouded. But never, not once, was there an instance in which his mental reflex was not contributory. Without exception I found these responses to be floodlights when they were fully laid open to view, and beacons flashing invaluable and accurate warning even when they remained partially shrouded.

The substantive character of Frank's thought is extremely difficult to capture on paper, whether written by himself or another.[1] The reason lay again in his insistence upon both range and elegance. Precisely when he was most sophisticated, it truly seemed to him that he had nothing to say that was not obvious. He thought everyone could see that the world is round, or that $E = mc^2$, or that *Perlman v. Feldmann*[2] was a freak case arising out of a failure of the pricing system to allocate resources. Even if he decided to write such things, how could he write very much about them? How do you sustain the story line when you can say it all with, "The world is not flat; generally speaking, it is spherical." Frank's obsession with synthesis, clarity, and integrity would not let him write until he had thought the problem entirely through. By then he would have to write one of two things: a severely simple statement, or a full blown jurisprudence. The first seemed trivial to him (though in this he was completely wrong) and out of step with the windy art forms of legal literature; the second he was not yet ready to write when on a summer's day the failure of a muscle shut off that splendid mind.

In Frank's intellectual process there was a large component of the poetic, the aesthetic, the half-perceived. His mental style brought to mind the long meditation followed by the *hokku* or the one perfect arrow of the Zen archer—Kazantzakis's Zorba staring in wonder at a pebble in his hand—or a Gaugin statement of a simple truth behind the clutter. Frank's working materials were less exotic; neither corporation law nor contracts will race the blood of many. But the analogy holds. In his materials, however gritty to some, and however small the fragment, Frank found the stuff of the cosmos. Every problem was a problem in depth; every class a class in jurisprudence.

As Joe Bishop has skillfully recorded,[3] Frank Coker was a fine friend, a first class lawyer, a remarkably balanced man, and a highly civilized human being. He may also have been a great man. He had everything he needed to become a preeminent legal philosopher, save one. Time.

The appraisal remedy for the dissenting shareholder is an unlikely looking topic for serious reflection. It seems narrow, technical, and of concern to the corporate specialist only. I believe this appearance is deceiving, however. The subject invites and rewards the kind of inquiry that was characteristic of Frank's mind—the search for the important behind the unimportant, the general behind the particular. Because of this, because the thoughts expressed here have doubtless been influenced by him, and because I think he just might like it, this essay is for Frank Coker.

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1. Coker, Book Review, 34 N.Y.U.L. Rev. 799 (1959). This is a remarkable piece, deserving close attention it has not generally received.

2. 219 F.2d 173 (2d Cir. 1955).

3. Bishop, *Francis W. Coker, Jr.*, 72 Yale L.J. 1 (1962).

THE APPRAISAL STATUTES

The dissenter's appraisal remedy is entirely the product of statute. Of the fifty-three corporation statutes now in force in jurisdictions of the United States, fifty-two of them provide for the remedy in some form.[4] These statutes provide that in some situations, the holders of some kinds of shares of a corporation may at their option, through some specified procedure, turn in their shares and force the corporation to pay them cash out of the corporate treasury in an amount usually stated as equal to the "value" of the shares. These are bail-out provisions; when certain events occur, some shareholders are given a put against the corporation.

The statutes vary considerably in scope and form. All, however, include a merger as a transaction that will trigger the remedy for all or some shareholders. For purposes of general discussion of the statutes, therefore, it is most convenient to take a merger as the model situation giving rise to the remedy. Later we shall consider other transactions under the statutes.

Civil Rights and Majoritarianism

It has become fashionable to discuss problems of corporations in the vocabulary of politics. I have protested elsewhere, and continue to protest, that we have enough problems in the corporate field without importing additional nettles from the democratic political process.[5] My protests do not appear to have significantly altered the trend, and as a matter of history, we have undeniably tended to see the problems of the one in the categories of the other. The voting machinery erected in the name of shareholder democracy offers one example. The dissenter's appraisal statutes are usually viewed as offering another. In political terms these statutes fill a basic democratic need to protect a dissident minority from the overwhelming power of the majority. A solicitous judiciary will use the injunction to protect the minority against the most heinous acts of the majority. Where the majority is not heinous but merely obnoxious, the dissenter is given a lesser remedy—the option to force the corporation to pay him off and let him go his way.

This concern for the minority has a familiar and congenial ring to the American mind. It sounds of Madison's warning that tyranny by the majority is more to be apprehended than tyranny by the few.[6] Probably this is the single

4. The fifty-three statutes are those of the states, the District of Columbia, Puerto Rico, and the Virgin Islands. West Virginia is the one state with no appraisal remedy. The statutes are summarized and cited in the Appendix to this article. For a collection of the literature on these statutes, see 2 MODEL BUS. CORP. ACT ANN. 412-18 (1960).

5. Manning, Book Review, 67 YALE L.J. 1477 (1958); Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U. L. REV. 38 (1960).

For a contrary view, see, *e.g.*, Latham, *The Body Politic of the Corporation*, in THE CORPORATION IN MODERN SOCIETY 218 (Mason ed. 1959); MILLER, PRIVATE GOVERNMENTS AND THE CONSTITUTION (1959).

6. Letter from Madison to Jefferson, Oct. 17, 1788, in 5 THE WRITINGS OF JAMES MADISON 269, 272-73 (Hunt ed. 1904). *Cf.* Letter from Jefferson to Madison, March 15,

most important problem that American public law has set for itself. It has been the chronic center of American political uproar, and we have invented an astonishing range of devices to deal with it. These are the terms in which we define "civil liberty," and much of the work of our constitutional conventions, our Supreme Court, and our legislatures has been devoted to it. Our basic federal political arrangements are a series of institutional arrangements for balancing majority and minority—from the two representational systems in the Houses of Congress to the role of the Senate filibuster. In our local and state governments we find recurring movements to install different kinds of proportionate representation and minority representation. Most current controversy in the field of labor law revolves about a protection of the dissident union member and "union democracy." And in the field of corporation law this American pattern is repeated, with the statutes showing great concern for democratic values by providing for class voting, cumulative voting—and the appraisal remedy for the dissenting shareholder.[7]

This perspective on the appraisal remedy is a stimulating one, and the courts have found it appealing to equate appraisal statutes with civil liberties. In their concern for the helpless minority shareholder, they have not scrupled to strain the appraisal statutes to bring him within it.[8]

In fact, however, the major effect of these appraisal statutes has been quite different from the function generally attributed to them. Almost certainly the statutes have made their major contribution not in shielding the minority, but in giving greater mobility of action to the majority—that is, to corporate managements speaking in the name of the majority. When a dissenting shareholder seeks to enjoin a transaction, the courts tend to turn him away if he has the appraisal remedy available to him.

Every fan of casebooks on corporation law knows the famous Delaware keystone combination—*Keller* to *Havender* to *Hottenstein*. In *Keller*,[9] minority holders of preferred stock were successful in obtaining an injunction against a charter amendment altering accrued dividend provisions in their stock. The court found that the minority had a "vested right" that could not legally be taken away by the charter amendment process contained in the Delaware corporation law. Subsequently, in the *Havender* case,[10] an identical change

1789, in TOCQUEVILLE, DEMOCRACY IN AMERICA 294 (1858); COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1943).

7. One must stand in awe of the democratic zeal of Illinois lawmakers who provided in the state *constitution* that shareholders should have the right of cumulative voting. ILLINOIS CONSTITUTION art. XI, § 3 (1870).

8. Hear the ringing voice of the court in a recent New Jersey opinion:

> The majority, no matter however overwhelming it may turn out to be, may not trample upon the property and appraisal rights of the minority shareholders of [the corporation], no matter how few they may be in number.

Applestein v. United Board and Carton Corp., 60 N.J. Super. 333, 352-53, 159 A.2d 146, 157 (1960), *aff'd*, 33 N.J. 72, 161 A.2d 474 (1960). See note 58 *infra*.

9. Keller v. Wilson & Co., 21 Del. Ch. 391, 190 Atl. 115 (1936).

10. Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A.2d 331 (1940).

in preferred stock was permitted by the Delaware court, and the dissenting minority failed to get an injunction, where the amendment was made through the use of the statutory merger provisions of the Delaware law. The court in *Havender* purported to find other grounds for distinguishing the two cases,[11] but it paused to note that under the Delaware corporation statute the plaintiff in *Keller* did not have the appraisal remedy available to him while the plaintiff in *Havender* did.[12] Most observers have felt that this was the key difference,[13] and in the *Hottenstein* case,[14] a federal court denied the minority's injunction on the sole ground that a merger was involved—even though it was a merger that had been rigged with a wholly owned subsidiary set up for the occasion.

In New York, the *Keller* rule on vested rights was never adopted. By the time the issue was litigated, the New York corporation statute had been amended to give the appraisal remedy to preferred shareholders whose accrued cumulative dividend rights were taken away by amendment. The New York court, through Judge Shientag, pointed out the availability of the remedy,[15] and upheld the constitutionality of the statute authorizing the elimination of arrearages by amendment. Again, the availability of the remedy made it easier for the court to permit the majority to go ahead.[16]

Permissions and protections have a way of getting scrambled in corporation law. We are schooled today to view the special statutory provisions on sales of all assets as protections to shareholders, designed to temper management's centralized control of so important a transaction. Historically, however, these sections were put into the corporation acts in order to soften the rigor of the judicial rule which protected the shareholder by requiring unanimous shareholder approval for such a sale.[17] Before the statutory provisions on sales of

11. In *Keller* the corporation was recapitalized under a 1927 amendment to the Delaware General Corporation Law passed after the corporation had been formed; in *Havender* the provisions authorizing the merger antedated the formation of the corporation. The distinction is not persuasive, particularly in view of the court's opinion in the intervening case of Consolidated Film Indus., Inc. v. Johnson, 22 Del. Ch. 407, 197 Atl. 489 (1937). There the facts were "precisely similar to the *Keller Case*" except that the corporation was formed after the 1927 amendment to the Delaware law. The court relied on the *Keller* case and enjoined the amendment, finding itself "unable to discover a difference in principle between the two cases." 22 Del. Ch. at 415, 197 Atl. at 493.

12. 24 Del. Ch. at 335, 11 A.2d at 339.

13. See Note, 88 U. PA. L. REV. 624 (1940); BAKER & CARY, CASES AND MATERIALS ON CORPORATIONS 1508 (3d ed. 1959). *Cf.* Note, *Accrued Dividends in Delaware Corporations—From Vested Right to Mirage*, 57 HARV. L. REV. 894 (1944). *But see*, Meck, *Accrued Dividends on Cumulative Preferred Stocks: The Legal Doctrine*, 55 HARV. L. REV. 71, 87-95 (1941).

14. Hottenstein v. York Ice Mach. Corp., 136 F.2d 944 (3d Cir. 1943).

15. McNulty v. W. & J. Sloane, 184 Misc. 835, 844, 54 N.Y.S.2d 253, 262 (Sup. Ct. 1945).

16. See Comment, *The Doctrine of Strict Priority in Corporate Recapitalization*, 54 YALE L.J. 840, 844-45 (1945).

17. BALLANTINE, CORPORATIONS § 282 (1946). The point is discussed in more detail *infra* pp. 254-60.

assets, the single dissenter could enjoin the transaction; after the statute, the management could nearly always muster the required majority vote. Similarly, statutory provisions on voting trusts originated not as a protection to non-participants, but as a legislative effort to overcome judicial hostility to this device.[18]

The early supporters of the appraisal remedy may not have foreseen that its availability would help to free corporate managements (the "majority") from some of the risk of injunction. Those who have proposed the remedy or its extension have always argued their concern for the lot of the dissident minority. But this may have been just good politics, and some may have been playing for the backlash effect. A willingness to play for the rebound in history requires considerable insight and great confidence in one's judgment. These attributes are more apt to appear in retrospect and in novels than in real life. Few business leaders have fought for the SEC's proxy rules or statutory requirements for shareholders' meetings and shareholders' votes; yet surely the trappings of shareholder democracy and the smokescreen vocabulary of the political process have done much to enable today's corporate managements to pursue their way substantially unchallenged and unregulated.

It is a nice question whether the early appraisal statutes were promoted by perspicacious legislative agents of management, who saw in these statutes a way to consolidate and liberate their own condition. But this has been the consequence.[19]

If one draws back another step or two and surveys as a totality the pressure for the appraisal remedy, the judicial response to it, and the liberating effect the statutes have had upon management's power, the whole sequence will be recognized as falling into the basic pattern that has characterized the evolution of American commercial law during the last one hundred years. We are all accustomed to observe, or to have pointed out to us, the rolling ground swell during this period from a law of fixity to a law of mobility, from a law centering on ownership to a law centering on claim, from a law focusing on the individual to a law focusing on groups. The development of the appraisal remedy parallels the surge toward free transfer and assignability in every corner of American law; the welling sympathy for the bona fide purchaser over the "owner"; the emergence of the collective bargaining agreement in place of the

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18. *Id.* § 184; Wormser, *The Legality of Corporate Voting Trusts and Pooling Agreements*, 18 Colum. L. Rev. 123 (1918).

The case of Warren v. Pim, 66 N.J. Eq. 353, 59 Atl. 773 (1904), is a classic example of early judicial hostility to the voting trust, which the court inhospitably described as a "masterpiece of professional ingenuity, which confides absolute and uncontrolled discretion to a group . . . whose personal stake in the success of the company is so insignificant that it may be disregarded entirely. . . ." 66 N.J. Eq. at 376, 59 Atl. at 781. In Perry v. Missouri-Kansas Pipe Line Co., 22 Del. Ch. 33, 191 Atl. 823 (1937), the court invalidated a voting trust that failed to comply literally with the Delaware statute authorizing voting trusts on the theory that the statute laid down for voting trusts "the law of their life."

For a typical early statute authorizing voting trusts, see N.Y. Laws of 1892, c. 687, § 20.

19. See note 38 *infra*.

individual working contract; the steadily rising status of the community claim as against the individual claim, as in land use planning; and the general tendency in the corporate field to center within management all significant operational control, and to relegate the shareholder's claim of "ownership" to the status of a fungible dollar claim. For nearly a century, our law has been opting consistently for mobility and the will of the group. It no longer seems feasible (or, it is significant to note, moral) to permit the objecting individual to stand in the way of a transaction approved (or at least not objected to) by a majority (or those acting in their name). Probably the courts would have come to the support of the majority's mobility even without the appraisal statutes.[20] The appraisal statutes are only a special legislative instance of a general legal trend.

The appraisal statutes may be viewed either as a bulwark for the rights of the minority, or as a lubricant to speed the spread of majoritarianism. Of course the statutes might do both, depending upon their administration and their application.

Administration

Process is the lawyer's special province. The non-lawyer seldom comprehends the lawyer's concern with matters procedural. It appears to be reserved to lawyers to understand that a remedy without a procedure for obtaining it is not worth very much.

The dissenting shareholder has available to him two courses of action other than the appraisal route. He may go along with the majority and hold his shares; or he may sell his shares on the market. If the appraisal remedy entails substantial cost—indeed, even modest cost—or if the holder is required to hang in uncertainty for a protracted period, the game of appraisal is usually not worth the candle. The usefulness of the remedy depends on the ease and efficiency of the procedure.

The early appraisal statutes announced that the shareholder was in some circumstances entitled to receive the value of his shares, but were almost silent on the way he was to go about collecting it. It developed, as it always develops, that numberless procedural issues were inherent in the situation. The way in which these issues were resolved would determine whether the dissenting shareholder held a buckler or a boxtop.

How long will the procedure take to collect on a claim under the appraisal

20. Lauman v. Lebanon Valley R.R., 30 Pa. 42 (1858), indicates that they would. Before the days of general merger statutes the Pennsylvania legislature authorized a merger of two railroads. A dissenting shareholder sought to enjoin the transaction. The court felt that the statute would have unconstitutionally impaired the dissenting shareholder's contract if he were forced to accept shares of another corporation. Struggling to uphold the merger, the court argued that the legislature must have meant to provide the dissenter with an appraisal remedy, but had just forgotten to do it. The court enjoined the merger, but only until security was given to the dissenter to pay him the appraised value of his stock. The merger went through and the dissenter was paid out in cash, all without benefit of legislation.

statute? Who is to pay for the expenses of appraisal, the claimant, or the corporation?[21] What are the ground rules on judicial review, appeals, delaying tactics? When does the dissenter have to make up his mind about filing the claim and does he forfeit other remedies if he files? When does the dissenter cease to be a "shareholder" for purposes of dividends, notices, suit, and other matters? Once he has undertaken the route of dissent and claim, may he change his mind and rejoin the majority? These questions, and many more, are relevant and important. In seeking to provide for them in advance, the modern statutes have become long and intricate.[22] And the procedure has grown long and expensive.

As could be confidently predicted, the courts have tended to be increasingly stringent in enforcing the procedural letter as the statutes have grown more complex in their procedural nicety. Yet, from another perspective, this seems a bit odd, when it is recalled that the statutes are said to be remedial in character and that the courts tend to stretch the scope of their application. The courts have been unmoved by the paradox and have produced from their other pocket the familiar script that the appraisal statutes were unknown to common law, are the creatures of statute, and "must" be strictly construed. As one commentator has observed, "The only safe advice is to 'cross all t's and dot all i's' if the appraisal remedy is desired."[23]

Altogether, the dissenting shareholder faces an unattractive and complex procedural obstacle course—supervised by a judiciary which, if not hostile, is disposed to present its stern Jehovan aspect.

Valuation

To the shareholder who objects to a transaction covered by the appraisal statute and who pursues his claim with procedural precision, the statute promises payment of the "value" of his shares. In recognition that this standard is hardly self-executing in its clarity, some of the statutes refine it a bit by, for example, specifying the time at which the stock is to be valued, or making it clear that the deciding authority is to exclude changes in "value" attributable to the transaction the shareholder finds offensive. If the shareholder objects to a merger between corporations A and B, and his stock in corporation A plummets as a result of the announcement of the merger, he is entitled to a valuation that disregards the sudden drop. None of the statutes attempts to go much further in assigning content to the word "value," though a few seek to reassure the shareholder by providing that he is entitled to the "fair value."

Their way so lighted, the courts have done their best to find, or assign, a "value" to dissenters' stock. Where the corporation is listed on an exchange or

21. This is a vital point. See Note, *Appraisal of Corporate Dissenters' Shares: Apportioning the Proceeding's Financial Burdens*, 60 YALE L.J. 337 (1951).

22. The most extreme case thus far is the elaborate body of provisions in the new Connecticut Corporation Act. CONN. GEN. STAT. REV. § 33-374 (1962). They will likely be found to provide answers to almost all procedural questions except those that actually arise.

23. LATTIN, CORPORATIONS 525 (1959).

where its shares are actively traded over the counter, the problem has proved manageable. The courts have virtually refused to go beyond an inquiry as to the market price on the date determined to be relevant.[24] The shareholder's argument that he was personally confident that the shares would go up some day has not been availing. And he has not succeeded in extracting a premium to compensate for his involuntary loss of "ownership"—to make up for the fact that the sale is, in his eyes, a forced sale.[25]

Where there is no continuous active market, the courts have had to pull out of the air a single hard figure as "the value." They have tried all the usual textbook techniques for valuation. They have capitalized earnings, inventoried break-up value, gone after the going-concern value, totted up replacement costs, and compared other corporations said to be comparable. In the absence of a solid market, share evaluation has proved no easier and no more predictable for purposes of dissenters' appraisal than for other purposes.[26] No one can be faulted for this unreliability. It is inherent in the process.

The Shareholder's Perspective

The shareholder's perspective of the appraisal statutes can now be assessed with some accuracy.

If the corporation is a listed company, or if its shares are actively traded, it is hard to see that the average shareholder—that fellow the New York Stock

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24. See In the Matter of Marcus, 273 App. Div. 725, 79 N.Y.S.2d 76 (1948); Application of Behrens, 61 N.Y.S.2d 179 (Sup. Ct. 1946), *aff'd*, 271 App. Div. 1007, 69 N.Y.S. 2d 910 (1947); In the Matter of Silverman, 282 App. Div. 252, 122 N.Y.S.2d 312 (1953); Dynamics Corp. of America v. Abraham & Co., 5 Misc. 2d 652, 166 N.Y.S.2d 128 (Sup. Ct. 1956); Comment, 17 FORDHAM L. REV. 259 (1948).

25. The shareholder's argument is as follows. If a man owns a Chevrolet "worth" $1,000 you may offer him $1,000 for it but you can neither force him to sell it to you, nor can you force him to exchange it for a Ford. But if a man owns the stock of Corporation A, you can, through a merger with Corporation B, force him to take either the stock of Corporation B or $1,000. Unlike the automobile owner, the stockholder is deprived of one option he may have wanted—to hang on to the stock of Corporation A. He concedes that the demands of the modern world will not permit him to block the merger and that he must forego his Corporation A stock. But he has received nothing for the loss of his ownership right in the A stock—the right to refuse all offers, however "fair" the price. Is he not entitled to something for that loss?

The ears of the courts have been deaf to this contention. One wonders how they would respond if the legislature passed a statute providing that one private person could compel another to accept a Ford for his Chevrolet or in the alternative to accept $1,000.

26. See, *e.g.*, Perlman v. Feldmann, 154 F. Supp. 436 (D. Conn. 1957); see also 1 BONBRIGHT, VALUATION OF PROPERTY 140-266 (1937); 13 FLETCHER, CYCLOPEDIA OF CORPORATIONS § 5899 (rev. ed. 1961); 10 MERTENS, FEDERAL TAXATION § 5912 (1958); Comment, 55 MICH. L. REV. 689 (1957); Annot., 38 A.L.R.2d 442 (1954).

There is an additional serious problem of determining what the relevant date should be for the valuation. Should it be the date of the merger closing? The date of the shareholders' meeting approving it? The date the proxy statements went out for the shareholders' meeting? The date of the initial press release on the upcoming merger? The date the word began to leak to the papers, to regular market traders, to specialists in the stock, to a handful of insiders?

Exchange insists makes $7000 per year[27]—can hope to gain anything from the statutes. If he files the dissenter's claim, he will certainly encounter delay in payment, he may encounter substantial litigation costs, he may make a procedural gaff that will cost him his option—and in the end he will be awarded the market price of the shares. He could have gotten that in the first place by the rather simpler method of calling his broker.

Where there is no active market for the stock, the situation is different, for the shareholder cannot easily get a "fair" price by selling his shares. Still, the appraisal statute may not be much help to him. The problem of unpredictability remains. After months of litigation and expense, the court may find a high valuation for the dissenter's stock. Or it may find a low one. The only things certain are the uncertainty, the delay, and the expense.

One situation springs to mind in which the dissenter has a clear incentive to pursue his statutory remedy. If the stock is traded actively so that a market value is known, and if that market value drops precipitately in demonstrable reaction to the transaction the shareholder finds objectionable, the appraisal statute can be substantially and predictably helpful. The shareholder will be entitled to the value of his shares without taking into account the effect brought about by the transaction; the figures are, in general, already known; and the company, having little to argue about, is apt to pay up promptly. One may question how often this sequence of events occurs, and whether the shareholder can learn the facts soon enough to help him decide on a course of action under the statute, but that is a different line of inquiry.

One other comment is in order about the shareholder's perspective on the utility of the appraisal remedy. It is widely repeated that the capital gains tax has a damping effect on the stock market. Shareholders tend to leave their investment where they put it, rather than flit from stock to stock, since each turnover is a taxable event. To the extent that this is so, the tax laws tend to dissuade the shareholder from making use of the appraisal mechanism. The shareholder who rides with the transaction, such as a merger, will often incur no tax. But, as the proxy statement will surely remind him, the shareholder with the ill grace to file a dissenter's claim will have to make his peace with Uncle Sam as well as with the corporation.

The Company's Perspective

So far the discussion has centered primarily upon the perspective of the dissenting shareholder. It has become clear, I think, that the statutes are not apt

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27. NEW YORK STOCK EXCHANGE, SHARE OWNERSHIP IN AMERICA: 1959 14 (1959). In 1956 the median household income of shareholders was estimated at $6,200. The New York Stock Exchange 1956 report had a figure of $7,100 for 1952. NEW YORK STOCK EXCHANGE, WHO OWNS AMERICAN BUSINESS? 14-15 (1956). The 1952 study, KIMMEL, SHARE OWNERSHIP IN THE UNITED STATES (Brookings Inst. 1952), found that the median income was between $5,000 and $10,000. *Id.* at 95. Compare LAMPMAN, THE SHARE OF TOP WEALTH-HOLDERS IN NATIONAL WEALTH 1922-56 (1962). *Cf.* Manning, Book Review, 67 YALE L.J. 1477, 1478-79 (1958).

to be very useful to him even where they are applicable. Does this mean that, correspondingly, the company—management and others with a stake in the enterprise—need not worry about dissenters' appraisal? Regrettably the answer is No. From the perspective of the company, these statutes can be a frightful nuisance, drain, and burden.

The corporation's special problem is that no one can know in advance how many dissenters there will be. The corporate managers are as uncertain as the stockholders about the "value" that will be assigned to each share by some appraiser or court six months after the transaction. But the shareholder at least knows how many shares he has; the corporation has no way of planning on how many dissenting shares there will be.

Even a relatively modest number of shareholders claiming the appraisal remedy may constitute a severe economic threat to the corporate enterprise. If some shareholders are unhappy with an impending merger and sell their shares on the market, the company's position is affected very little if at all. If those shareholders go the appraisal road, however, a sudden and largely unpredictable drain is imposed upon the corporation's cash position. This demand for a cash pay-out to shareholders often comes at a time when the enterprise is in need of every liquid dollar it can put its hands on.

Some kind of corporate surgery is going on; the enterprise is much more apt to be in need of a blood transfusion than a leeching. If the merger involves a marriage between two economic enterprises and is not just a paper merger, the period following the closing will likely be a period of intense activity as a general reshuffling takes place in the administrative, productive, and distributional arrangements of the combined enterprise. The management hopes that in time these steps will prove economic; but in the short run many of them will require a cash in-put. For example, it will be desirable to cancel a lease on a now duplicate facility in order to save double rent payments in the future, but the cancellation will cost an immediate penalty payment in cash to the lessor.

This may be a time, too, when uneasy trade creditors, suppliers, or banks may decide that they would be happier to have cash in their pockets rather than a claim against the still untried combined enterprise. The creditor of corporation A suddenly finds an unknown horde of creditors of corporation B standing equally beside him, and, typically, he knows little or nothing about the amount or liquidity of the assets that corporation B has brought to the marriage. The creditors of corporation B feel the same apprehension about corporation A. Both are inclined to get a little itchy for cash. When, at precisely the wrong psychological moment, the corporation ladles out a dollop of dollars to its shareholders under the appraisal statutes, the reaction of creditors may be one of consternation and the run begins.[28]

28. Do the appraisal statutes work as a tacit exception to the statutory restrictions on distributions out of capital? How does the dissenter's claim rank as against other claims against the corporation? In a Chapter X reorganization proceeding, should a block of matured claims by dissenting shareholders be treated as senior to, equal to, or junior to claims of general creditors? Though the appraisal remedy operates as a bailout for some

Even though the company may be economically very strong, it may not be able to go ahead with the merger at all if the aggregated claim of dissenting shareholders under the appraisal statutes comes to a high figure. This means that for purposes of planning its course of action, and deciding whether to go ahead with the merger, the management needs to know as soon as possible what the total cash demand is likely to be. And here is the rub. The answer obviously depends upon the claim procedure prescribed in the appraisal statute. But under the procedures of many of the statutes, claimants are not required to file their claims until some time after the merger. The situation is both circular and dangerous.

Under most of the statutes, little or no thought has gone into the impact of the claims procedure upon the conduct of the corporate transaction. From this perspective, important questions include: What shareholders are eligible to make a claim—all shareholders?—those shareholders who did not vote for the plan?—those shareholders who voted against the plan? When must the dissident shareholder give notice that he proposes to claim for appraisal?—in advance of the authorizing shareholders' meeting?—at the meeting?—within X days after the vote?—within X days after the meeting at which the vote is taken?[29]—at any time before the merger is effected? What steps are required by the shareholder to mature his claim, and when? The later the shareholder may give notice of his claim the more the corporate management is disadvantaged in making necessary decisions.[30]

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shareholders, the effect of this bailout on other claimants to the corporate pot is almost totally ignored in the statutes and is unlitigated. The Model Corporation Act at least provides that no purchase of or payment for the shares of dissenting shareholders shall be made if it will render the corporation "insolvent." 1 MODEL BUS. CORP. ACT ANNOT. § 5 (1960). Does this mean that the merger cannot be effectuated if the dissenters are not paid, or that the merger can go through but that dissenters must wait until the corporation is sufficiently liquid to pay the appraised value of the shares? *Cf.* Wildermuth v. Lorain Coal & Dock Co., 138 Ohio St. 1, 32 N.E.2d 413 (1941) (preferred stock sinking fund), noted in 7 OHIO ST. L.J. 241 (1941). Some of the statutes are clear that as soon as the dissenter files his claim he ceases to be a "shareholder." When, if ever, does he achieve full status as a "creditor"?

29. Counsel does what he can to cope. I know of one instance in which counsel arranged to hold the shareholder vote on the merger, then to adjourn the meeting over for eleven days with the thought of undoing the shareholder vote on the eleventh day if too many dissenting shareholders filed their claims during the ten day period for claim provided for in the statute. Did the ten-day period begin at the time of the vote, or at the time of the adjournment over, or at the adjournment *sine die*? And, assuming that a lot of other problems could be gotten around and that on the eleventh day the approval of the merger could be rescinded effectively, was it clear that the subsequent rescission would cut off the matured claim of the dissenting shareholder?

The corporate practitioner leads a tolerable life only because so few of the things that could happen do happen and so few of the issues that could be raised are raised. In the particular instance the management considered the number of dissenters manageable, went ahead with the merger, and the adjourned meeting of shareholders reconvened only to adjourn *sine die*.

30. The fifty-two statutes on appraisal answer these and related procedural questions every which way. They reflect little recognition that the answers are important. Statutes

It should be noted, too, that the bargaining position of the potential claimants under the appraisal statutes is disproportionate to their number. Ninety per cent of the shareholders may have voted for the merger and the merging corporations may be economically sound, but if the market value of the shares is substantial, the corporation may not be able to find the cash to buy out the ten per cent of the shareholders who did not vote for the transaction and may have to pull out of the deal. In such a situation, the appraisal statutes have obviously failed in the job of providing simultaneously for a protection to the dissidents and an avenue of mobility for the majority.[31]

such as New York's are to be commended for requiring the shareholder to notify the corporation in advance of the shareholders' meeting if he proposes to dissent and claim payment for his shares. As subsequent discussion shows, this provision does not solve the problem but it does mitigate it somewhat.

Most of the statutes are quite unsatisfactory in their handling of the problem of selecting a forum and of the problem of consolidating procedures in appraisal situations. These matters were simply not thought about in the statutes and the courts have been left to improvise. In general, though not necessarily, the dissenting shareholders are likely to proceed in the courts of the state of incorporation. And, in general, the courts manage to have the various appraisal proceedings consolidated. Here arise many obviously awkward problems surrounding the conduct of the proceeding. Whose counsel is responsible? How are costs shared? How are tactical decisions made? The administrative problem is somewhat akin to running a bondholders' protective committee. The most promising approach for solution of some of these problems lies in viewing the company as the initiator of a single proceeding, with the individual dissenting shareholders treated as intervenors because of their interest in the matter. This will at least produce a consolidated proceeding, but many procedural questions will remain unanswered. For example, what responsibility has the corporation to notify shareholders that there will be such a proceeding or that it is in process? *Cf.* Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes*, 23 LAW & CONTEMP. PROB. 307 (1958).

Again, timing is important. Ideally the management would like to know how many dissenters there will be who demand payment of their shares and what the valuation figure will be for the shares—all in advance of a final commitment on the transaction. No statute provides for this, and it does not seem possible to design a practical procedure for achieving it.

Many mergers are interstate, that is, they involve corporations formed under the laws of different states. If the shareholders of all participating corporations are entitled to the appraisal remedy, related proceedings may be under way in two or more jurisdictions, all running on different time schedules and under different ground rules. This does little to unstick a sticky situation.

On the exclusivity of the appraisal remedy, see note 38 *infra*.

31. Louisiana, and to a lesser extent Oklahoma, have apparently been impressed by this line of reasoning. Lousiana grants the appraisal remedy only if less than 80% of the shareholders vote for a transaction to which the remedy would be applicable. LA. REV. STAT. § 12.52 (1950). OKLA. STAT. ANN. tit. 18, § 1.158(e) (1951) provides that: "If such articles so provide, no right to dissent shall exist in behalf of any shareholders as to any specified corporate action . . . if such action be approved by the vote or written consent of the holders or at least ninety (90%) percent of all outstanding shares . . . and of at least three-fourths (¾) of the shares of such class or classes." This neatly solves the problem of the disproportionate bargaining position of the minority. It also throws away completely the only purpose the statutes ever had.

I have spoken so far as though the management would have no difficulty in calling off the merger if it should develop that the total of appraisal claims is more than the corporate treasury can withstand. But is the board of directors authorized to call off a merger after the required majority of the shareholders has voted for it? In a few states the law is fairly clear on the point.[32] In most of them it is not. If the management is extremely cautious and calls off the merger because of the possible, but speculative, cash drain to dissident shareholders, may a shareholder who favored the merger challenge that judgment in court? Then, what of the other corporation participating in the merger? Suppose, to make it easy, that all the shareholders of Corporation A approve the transaction but the board of Corporation B decides at the last minute to pull out because of the amount of cash it thinks the enterprise may have to pay out to dissenting shareholders of Corporation B? May the board of Corporation A accede in this as against the complaint of a shareholder of Corporation A? Has the board of Corporation B incurred any liability to Corporation A or its shareholders? The various possible combinations of claimed injury are interesting to plot against a rapidly moving stock market in which the various classes of stocks of Corporations A and B go up and down independently of each other when the merger is off the rails but, when the merger appears to be imminent, move together in a relationship set by the exchange ratios in the merger agreement—the whole distorted at random by the imperfection of the intelligence reaching the public.

The alert corporate practitioner seeks to anticipate these difficulties and provide against them contractually in the merger agreement. It is common to find in merger agreements kick-out provisions under which one or both boards may call off the transaction if it appears that an intolerable amount may have to be paid to dissenters. These provisions help. But they do not fully solve the problem. They introduce an extraneous element of contingency into the transaction. They impose a severe bargaining disadvantage where only one of the participating companies thinks that it has a substantial number of potential dissenters: the shareholders and management of the unanimous company are not apt to be happy at seeing *their* cash siphoned off to shareholders of the other corporation immediately after the merger. Under some of the corporation statutes there are legitimate questions about the legal authority of the directors to move even under these contractual provisions.

32. CONN. GEN. STAT. REV. §§ 33-368, -374(i) (1962). The New York Statutes are silent on this point, but the courts have been forced to wrestle with related problems. In the Matter of Millard, 221 App. Div. 113, 222 N.Y. Supp. 633 (1927), indicated that directors may pass resolutions abandoning the transaction and that this abandonment will cut off the dissenters' appraisal rights. In the Matter of McKinney, 306 N.Y. 207, 117 N.E.2d 256 (1954), the Court of Appeals upheld a stockholders' resolution authorizing a charter amendment whenever the directors decided to effectuate the amendment. And In the Matter of Hake, 285 App. Div. 316, 136 N.Y.S.2d 817 (1955), the court held that if the directors fail to act within a reasonable time and the authorizing resolution is not rescinded, an order for appraisal and payment should be made.

The availability of the kick-out tends to poison the whole atmosphere of the negotiation and to expose other terms of the transaction to continuous redickering. If the market or business conditions are fluctuating, there is always room for argument that the board that called off the deal was motivated less by a worry about dissenters than by second thoughts on the whole deal. One does not have to be unduly cynical to recognize that the president of Corporation A may find it helpful to include a kick-out clause in the merger agreement and to hope that a substantial number (but not too many) of the shareholders of corporation A will dissent; in that case his judgment to merge or not will be hard to question whichever way he goes, and those insiders who wish the transaction to go through are likely to see the wisdom of providing adequately for the position, salary, and prerequisites of the president of Corporation A in the newly combined enterprise.

It is not easy to ask the shareholders to approve an "iffy" merger. It is not necessarily politic to explain all the implications of the kick-out clause in the proxy statement—and it may be dangerous to explain too little. The situation is prickly all around.

Thus in the merger situation the appraisal statutes can be pretty serious business from the perspective of the corporation. Fortunately, the average shareholder either votes for the transaction or, in the remote event that he has thought about the transaction and reacted against it, he simply sells his shares. But there is a different species of professional shareholder-at-large whose mind and method run somewhat differently. He, or his counsel, sees in the appraisal statutes a jimmy that will open windows. The professional shareholder can use the appraisal statute to give mechanical advantage to his relatively small share holdings. He can abuse the procedural process under the appraisal statute to the cost and disruption of the enterprise.[33] He can also, especially where management is concerned about the company's cash position or is anxious that the number of dissenters not grow great enough to trigger a kick-out clause in a merger agreement, use his marginal swing position in an attempt to make a side deal for himself in exchange for not dissenting. His tactic will usually be to vote "no" to the transaction, wait until the last minute for filing his claim, and hope that circumstances will give him stick-up power.

Altogether, the dissenter's appraisal statutes do not seem to work out very well in their practical administration. At best they are of modest and infrequent help to the dissenting shareholder, and they can be a distinct threat to others who have a stake in the enterprise. One may expect to find, therefore, that they have been limited in application to situations of special need. Where are the statutes applicable?

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33. In Application of Deutschmann, 111 N.Y.S.2d 140 (Sup. Ct. 1951), *aff'd*, 279 App. Div. 642, 107 N.Y.S.2d 1008 (1951), the movant in a dissenters' appraisal proceeding demanded all the books and records of Western Electric Corporation, ostensibly for use in determining the asset value of the shares. Movant owned 1,786 of the corporation's 28,615,-956 outstanding shares. The corporation's motion to vacate the subpoena *duces tecum* was granted in that instance, but such fishing expeditions are not always squelched.

For Shareholders Only

For whom is the appraisal remedy provided? The short answer is "shareholders." Many nonshareholders may also have a vital interest in a company transaction such as a merger. There are, as some express it, many constituencies to the corporate enterprise: the workers, the salaried employees, the long-term investing creditors, the short-term supply creditors, the lessor, other symbiotic enterprises, and even, one hardly dares add, the consumers. These groups often have much more riding on a merger than the shareholders. The merger may cost them their jobs, their careers, the priority or security of their loans, their customers, their homes. Moreover most of these groups have no alternative avenue of escape that matches the shareholder's easy route of selling his shares on the market. And many will not have the chance to stay with the enterprise, as the shareholder always can do. Yet the shareholder, and only the shareholder, is singled out for special remedial attention by the corporation acts.

One might explain this by charging that American law has always been more interested in protecting "owners" than in protecting anyone else: that's capitalism for you. Or, one might also argue that shareholders receive their protection through the corporation acts while other groups—other constituencies—receive theirs through other statutes. There is something to be said for both of these explanations, though the second would be a little stronger if in fact other statutes existed for avoiding, mitigating, or phasing out the repercussions of economic combinations upon workers, suppliers, or local communities. But I suggest another explanation, and in so doing advance a thesis to which I shall return later in this essay.

If the appraisal statutes are considered as attempts to solve an *economic* problem, they are obviously outrageous and absurd in concerning themselves exclusively with the shareholder. But suppose the appraisal remedy is viewed as a device of form and not of economics—a device of form designed to meet a problem that is itself formal in character and peculiar to shareholders? This thought might usefully be kept in the back of the mind as we turn to look at the triggering transactions under the appraisal statutes—that limited body of corporate transactions specified in the statutes as giving rise to the appraisal remedy.

TRIGGERING TRANSACTIONS

Let it be stipulated that shareholders, and shareholders only, concern us.[34] When, under what circumstances, should these shareholders be given a statutory appraisal remedy so they can jump clear of the corporate enterprise if they do not like its course? One possible reply would be: "Under all circumstances."

34. If "shareholders" are the only ones who have a remedy, it becomes important to know who is a "shareholder" and who is not. What set of events and documents will lead a court to include a claimant in the category "shareholder" or exclude him? As always it develops that we are not sure what we mean by a legal category like "shareholder" whenever anyone raises a real question about it, as the following three cases illustrate in three

What would be the effects of a legal rule permitting shareholders to bail out whenever they wish? The question is not difficult. We apply substantially this rule in the case of the open end investment company. The peculiar features of that kind of enterprise mark out quite well the limiting circumstances under which shareholders may be extended the option of unlimited bail-out. First, such a rule would require that the company be maintained at a high level of financial liquidity since it could not be predicted how many shareholders would demand to be bailed out at any one time. This is easy for the investment company; its assets are all in cash or immediately marketable securities. For most lines of business, however, such a level of liquidity is either impossible or economic idiocy. Second place, if shareholders are to be demanding payment of the "value" of their shares with any frequency, there must be some available technique for rapidly determining that value. The open end investment company does not promise to pay the "value" of the shares. It agrees to pay an

different contexts. Jordan Co. v. Allen, 85 F. Supp. 437 (M.D. Ga. 1949); Berkwitz v. Humphrey, 163 F. Supp. 78 (N.D. Ohio 1958); Hazel Atlas Glass Co. v. Van Dyck & Reeves, Inc., 8 F.2d 716 (2d Cir. 1925).

Classical legal thought assures us that this process of classifying "facts" by legal category is an essential part of the "rule of law": that justice means equal treatment of all those who are "found" to fall into a particular legal category, or, more accurately, equal treatment insofar as the prescribed incidents of that category are concerned. The adjudged king and the adjudged thief may be treated differently in many significant respects, but, if both are "shareholders," both must receive the appraisal remedy.

This process has a reassuring tone of objectivity about it. But it requires at least three steps: (i) excogitating an abstraction like "shareholder"; (ii) selecting out from an infinity of other candidates that particular abstraction as the one upon which to hang the particular set of significant consequences that are sought to be invoked; (iii) "applying," as we are fond of saying, the abstraction to sets of events. No one any longer believes that the third step—"applying" the category—is automatic, and most legal commentary revolves around the "correctness" of a particular classification made in a particular instance—whether the facts in the case showed that the corporate security was "really" stock or "really" a debenture. Our legal commentators are inclined to concentrate on this step, because Anglo-American jurisprudence is fascinated by the judicial process, and this throwing of facts into bins is what judges talk about in their opinions. But, difficult and baffling as the third step is, steps (i) and (ii) are much more mysterious. How and why did we rear the abstraction "shareholder"? Out of the infinity of imaginative constructs created and creatable by the human mind, why did we choose to hang the availability of the appraisal remedy on that particular legal abstraction? As against these questions, it seems relatively less important that we cannot tell a "shareholder" when we see one. But then Anatole France has already made the point with his figure of the rich man, the poor man, and the bridge.

Under the statutes no one who is not a shareholder may enjoy appraisal, but not all shareholders are so favored. Some statutes limit the remedy to voting stock, *e.g.*, CAL. CORP. CODE § 4300 (1955). North Carolina and Connecticut limit appraisal rights triggered by certain types of charter amendments to preferred stockholders. N.C. GEN. STAT. §§ 55-101(b), -102(a) (1959); CONN. GEN. STAT. REV. §§ 33-373(a), (b) (1962). Some states restrict the appraisal right to stockholders of record at the time of the vote. Goodisson v. North American Securities Co., 40 Ohio App. 85, 178 N.E. 29 (1931). Matter of Bacon, 287 N.Y. 1, 38 N.E.2d 105 (1941). See generally 13 FLETCHER, CYCLOPEDIA OF CORPORATIONS § 5894 (rev. ed. 1961).

amount that is quickly measurable—an amount based upon the holder's proportionate share of the aggregate market value of the securities held by the company. For any company with fixed assets, for any company whose assets are other than cash and securities, this kind of rapid and unchallengeable valuation is not feasible.

In earlier pages, the point was made that the appraisal statutes, where applicable, pose a difficulty for the corporation because of the drain on the company's liquidity and because of procedural difficulties. Every extension of the appraisal remedy increases the burdens on the going enterprise. Indiscriminate extension of the remedy is pernicious. The remedy should apply only where the risks to the shareholder are great. And the remedy should not be made applicable to a class of transactions unless the benefits to the minority shareholders outweigh the consequent burden imposed upon the enterprise.

We must be selective. To help us to be selective it is useful to consider and compare a series of candidates. Following and on succeeding pages are three lists of events that may occur in the normal life course of an incorporated enterprise. The reader is asked to read over the lists with some deliberation. The question is: Should objecting shareholders be given the appraisal remedy in some, all, or none of the listed transactions or events—and why?

List I

— A rise in the United States balance of payments deficit
— An Antitrust suit brought by the Justice Department against the company
— A Presidential heart attack [35]
— Introduction of a promising new product by a competitor
— A declining stock market
— Nationalization of some of the company's foreign assets
— Large scale disarmament

In each of the cases in List I the shareholder may suddenly find his investment in the company threatened with extinction. He would be delighted to have the appraisal option open to him. But despite his desires in the matter and despite the economic fate about to overtake him, the appraisal statutes are, as every lawyer knows, not available to him. It is said that risks of the kind just listed are "assumed" by the investor. This answer is no more satisfactory here than it ever is, for the question is: Why are these risks imposed upon the investor while others are not?

All the events listed above have one feature in common. They are all, in a manner of speaking, external to the corporate enterprise—that is, they are events that were not, in a direct sense, brought about by any of the constituencies of the corporation. One may say, and it is usually said, that the "reason" these transactions are not triggering transactions under the appraisal statutes is that they are not transactions brought about by the will of the majority and objected to by the minority. This statement may be accepted as descriptively accurate.

35. On the day following President Eisenhower's first heart attack the aggregate market value of all securities listed on the New York Stock Exchange dropped fourteen billion dollars. N.Y. Times, Sept. 28, 1955, p. 1, col. 6.

But it is hardly a satisfactory "explanation," for it leaves open the question: Why are we interested in protecting the investor against internal risks only? Let us leave that one with the answer that we are interested in internal risks because we are, and move on.

Here then is a second list of events out of a corporate biography. To meet the criterion just set, each of these transactions is internal to the constituent structure of the corporation, and not imposed by outside forces:

List II

— Mass resignation by the management
— An involuntary petition in bankruptcy for the corporation
— A demand by the relevant union for higher wages, accompanied by strike threat
— The refusal by a majority of the debenture holders to approve an indenture amendment considered by the shareholders to be vital to the continued successful operation of the enterprise
— A buyers' strike
— A refusal by important suppliers to continue to supply the company

Each of these events is fraught with danger to the shareholder's investment. And each is precipitated by a group that is in some sense "internal" to the enterprise, is in some degree committed to its fortunes, and is in a position to affect those fortunes directly. Yet the appraisal statutes do nothing to protect the shareholder against the decisions of his fellow constituents in any of these instances. Creditors, workers, officers, customers, suppliers—all may whip things about as they will, and the shareholder will have to hold on to his seat and ride it out. When these people rock his world, the dissenter may not order it stopped for him to get off. He is never given that option unless the transaction was brought on by his fellow shareholders, or, very occasionally, by the directors. No one else counts.

The significance of this evident fact is seldom observed. To limit statutory concern to shareholders' and directors' acts is wholly arbitrary. The dissenters' investment can be as much threatened by acts of bondholders as by acts of shareholders, as much by wage paid workers and salary paid officers as by fee paid directors. It is circular and meaningless to say that the remedy is available in transaction X but not in transaction Y, "because" shareholders decide transaction X while transaction Y is brought on by non-shareholders.

To limit our concern to acts of shareholders makes it now apparent that we are not dealing with an economic problem or with economic solutions. The economic risk to the shareholder does not turn on the question of who was responsible for the event giving rise to the risk; and when the statutes undertake to differentiate among those effectively causing the event, they do not make the differentiation in economic categories, but in lawyer's categories. We may say of an operating business enterprise that a variety of economic constituencies play important parts, and we can to some extent isolate and describe these. In statements of this kind we are seeking to make operational statements about economic phenomena. But when we say that we are interested only in those events that are brought about immediately by "shareholders" and "directors" we are no longer in the world of the economist or political scientist—we have reconfirmed our disinterest in economics and climbed onto a level of unadulterated legal categories. We did this first when we chose to limit the appraisal remedy to shareholders. With this second step, we have moved still farther away from economics and economic policy. We have fled the brassy realm of practical effects and entered upon the golden realm of lawyers' abstraction where the din of the market place can scarcely be heard.

Just *why* we should have proceeded in this way is not at all clear. But accepting as given that no shareholder will be accorded the appraisal remedy except in events or transactions brought about by other shareholders or directors, we should now look at a third list of transactions, all of which meet this condition. This list is somewhat more detailed and, for ease of comparison, the events have been arranged into crude groupings. Which, if any, of the following events should give what shareholders a statutory out?

List III

— The shareholders vote out the board. Ninety-eight per cent of the shareholders mark their proxies "da" on a resolution of confidence in the management currently languishing in jail under Sherman Act convictions. A majority interest in the corporation's stock or other securities changes hands.

— In 1962, the company shifts from the manufacture of buggy whips to the manufacture of seat belts. The company shifts from the manufacture of seat belts to the manufacture of buggy whips. The company plunges into, or pulls out of, European operations. The company buys 100,000 shares of New Haven Railroad stock. The company files a voluntary petition in bankruptcy.

— The shareholders amend the purpose clause in the charter. They amend the charter to: change the corporate name; change the home office; change the number of directors; scrap cumulative voting; change the par value of a class of stock.

— The company pays a large dividend. The company refuses to pay any dividends. The company makes a large distribution of assets to junior security holders. The company makes periodic distributions of cash or of other assets, looking forward to a distribution of all assets. The corporation donates a million dollars to charity.

— The corporation dissolves.

— The company enters into a long term labor contract under which all foreseeable profits will go to the union. The company enters into a long term labor contract under which, by prevailing standards, the workers are grossly underpaid. The company enters into long term executive employment contracts calling for astronomical salaries and lavish perquisites.

— The company issues senior stock. It issues *pari passu* or junior stock. It issues stock for cash. It issues stock for securities or other noncash assets. It issues stock for cash or assets at less than the "market." It grants stock options to a management group at less than "market." It grants stock options to others at less than "market."

— Corporation *A* merges with Corporation *B*, the latter "surviving." Corporation *A* merges with Corporation *B*, the former "surviving." Corporation *A* consolidates with Corporation *B*, Corporation *C* resulting. Corporation *A* acquires all the stock of Corporation *B*. Corporation *B*, a 100 per cent subsidiary of Corporation *A*, is eliminated by merger with Corporation *A*, by dissolving and handing over its assets as a liquidating distribution, by distributing its assets without dissolving, by buying up and cancelling all the *B* securities held by *A*.

— Corporation *A* buys $1 million of assets from Corporation *B*. *A* sells $1 million in assets to *B*. *A* sells all its assets to *B* for $1 million. *A* buys *B*'s blast furnace for cash; *B* buys *A*'s cash for a blast furnace. *A* sells real estate to *B* with a lease back to *A*. *A* buys real estate from *B* with a lease back to *B*. *A* buys assets, paying for them by issuing its securities —equity and debt. *A* translates its fixed assets into cash or securities in one transaction. *A* translates its fixed assets into cash or securities in a series of transactions.

— Corporation *A* buys all the assets of Corporation *B* for *A* securities, and after X months, *B* distributes the *A* securities to its shareholders; sells the *A* securities on the market and distributes the cash to the *B* shareholders; dissolves and distributes the *A* securities; dissolves and sells the *A* securities.

— The corporation lists or delists on the New York Stock Exchange.

If a man from Mars were to read over this list of events, how would he assess their significance to the objecting shareholder and pick out those transactions so direful as to call for the extraordinary measures of the appraisal remedy? Only the most highly sophisticated Martian—or the most unsophisticated—would be able to guess what our statutes have done.

In the Appendix is a table of the fifty-two appraisal statutes. It shows the transactions that entitle the shareholder to the remedy under each statute. Very few of the transactions listed show up in any statute, and the only transaction common to all the statutes is the merger. To what does the merger owe the honor of this unanimous attention?

Merger

Many of the events or transactions on List III will be certain to produce adverse or catastrophic results for the shareholder. There is nothing economically baneful about a merger; it may, frequently will, greatly benefit the shareholder. Of course economic loss *can* follow from the merger, but in this respect the merger is not distinguishable from any other transaction on the list. So why the merger?

The answer must be sought not in economics but in ideology. In our more lucid intervals, most of us who are interested in business organizations see in General Motors a localized organization and aggregation of human beings and economic assets, a particular kind of social organism that in this society carries out a variety of economic and other functions. I do not know whether the nineteenth century mind saw this very clearly. It is apparent, however, that it saw something in addition, if not in its place. The nineteenth century legal mind saw the "corporation." It vividly saw the "corporation"—the legal construct—as something quite separate from the economic enterprise, three dimensional, virtually alive, a little bit sacred because of its "immortality" and connection with the "sovereign," and withal terribly important.

Corporation law of the nineteenth century in the United States is permeated with the flavor of this viewpoint. Our most modern corporation acts are still redolent of it. Corporations "come into existence" and "die." Corporation acts devote great attention to "dissolution"; they say almost nothing about administering the enterprise's assets after the "death" of the corporation. The nineteenth century obsession with corporate "powers," "franchises," and *ultra vires* was grounded upon the insistence that corporation law was about corporate ideology, not about economic policy. If the legislature created a particular corporation in the shape of a horse, the horse "could not" moo. It was not that the enterprise *should* not violate a legislative prescription; it was that the "corporation" *could* not do so as a matter of inherent incapacity. The horse eschews mooing because it is not in its nature to moo; not because some regulatory authority has ordered it to stick to the whinny.

Of like character were the mountains of papyrus collected about questions like: "Is" a corporation a "person"? "Is" a corporation "really" an "entity"? "Is" a corporation "really" a "fiction"?

It is a fascinating experience to dip comparatively into the legal commentaries and the legal text books on corporation law of the mid-1800's, the late 1800's, the early 1900's, and those of the 1920's and 1930's. The record shows the analysts, the legislatures, and the judges of this period slowly fighting their way out of the platonic murk accumulated over a period of two thousand years. In the last sixty years of business law in the United States, point by point, topic by topic, issue by issue, the commercial image of the business organization has emerged to overshadow the concept of the "corporation."[36] The fight is not yet over but the victory is won and little is left but mopping up operations.[37]

36. A few still find the earlier environment more congenial. See, *e.g.*, BUCHANAN, REDISCOVERING NATURAL LAW (1962); BUCHANAN, THE CORPORATION AND THE REPUBLIC (1958).

37. One result of this break-through is that corporation law, as a field of intellectual effort, is dead in the United States. When American law ceased to take the "corporation" seriously, the entire body of law that had been built upon that intellectual construct slowly perforated and rotted away. We have nothing left but our great empty corporation statutes —towering skyscrapers of rusted girders, internally welded together and containing nothing but wind. But that is a broader thesis best saved for another day.

Those of us in academic life who have specialized in corporation law face technological unemployment, or at least substantial retooling. There is still a good bit of work to be done to persuade someone to give a decent burial to the shivering skeletons. And there will be plenty of work overseas for a long time to come, for in Latin America, and to a lesser extent on the Continent, the "corporation" yet thrives and breeds as it did in this country eighty years ago.

But one's history is a part of his present. Monuments often outlive the philosophies they were built to glorify. The pyramids are one example. The appraisal statutes are another. To the nineteenth century mind contemplating such matters, a corporate merger was a major and significant event. In the first place it involved a species of corporate assassination. A "corporation" died. A three-dimensional thing, created by the sovereign legislature, had passed away. These things were not matters to be taken casually. But something else happened, too. The shareholders of corporation A somehow became shareholders of corporation B and no longer shareholders of corporation A. The mere statement of such a preposterous proposition did violence to fundamental principles. How *could* a man who owned a horse suddenly find that he owned a cow? Furthermore—or perhaps this is but another statement of the same point—even if this transmutation could somehow be brought off, surely it could not constitutionally be done without the owner's consent. You might try to persuade him to sell his horse or to exchange it for a cow, but surely you could not whisk it away from him. Freedom of contract, rights of property, Constitution, law, and morals would forbid it, even if the *leger demain* for the conversion had been mastered. Given a nineteenth century view of freedom of contract this line of reasoning required only one premise: a "corporation" is just like a horse. The law of the last century had no doubt that it was.

Nebulous suspicions about big economic combinations helped to reinforce this jaundiced view of merger. Mack the Knife says somewhere in the Three Penny Opera: "I rob banks. Is it worse to rob a bank than merge a bank?" Whether Brecht was just flaying capitalists, slyly supporting Stalin's role in the Georgian banking operations, or merely writing a sharp line for audience response, is hard to say. But it is certain that the public, even the most educated public, has had no success at all in distinguishing the corporate form from the underlying economic event. Orators have always inveighed against "corporations" when they meant large enterprises; and the people have suspected "mergers" and passed laws against "trusts" when they had in mind business combines. Public education on these matters has not been accelerated by the fact that much of the time the bar, the legislatures, and the courts have had them all mixed up too.

In any case, to the nineteenth century mind, mergers were deeply suspect. When commercial pressures forced the enactment of the general merger statutes, the function of the appraisal statutes was clear. They met a conceptual and ideological problem—how to preserve the constitutionality of the merger statutes.[38] The appraisal provisions were calculated to solve a purely conceptual

38. The Pennsylvania court had blazed the way in Lauman v. Lebanon Valley R.R., 30 Pa. 42 (1858), discussed in note 20 *supra*. The Pennsylvania legislature took the hint literally and passed the first appraisal statute, limiting it to railroad mergers. Pa. Laws 1861, No. 657, at 703. New Jersey followed Pennsylvania's lead, and in 1878 passed an appraisal statute similarly limited to railroad mergers. N.J. Acts 1878, ch. 49, at 59. Both of these appraisal provisions were part of general statutes authorizing the consolidation and merger of railroads. When in 1883 New Jersey passed a statute authorizing the con-

need—to provide something for the shareholder who was about to undergo a *legal* trauma—a trauma deemed compensable regardless of its economic consequences upon him. By ideological assumption, no one but a shareholder could suffer this trauma; only other shareholders could inflict it; and damages were irrelevant. It never occurred to anyone to ask about the effect of the combina-

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solidation of corporations created to establish ferries, piers, docks, or stockyards, dissenters were given an appraisal remedy. N.J. Acts 1883, ch. 198, at 243. It was not until 1896 that New Jersey authorized the consolidation and merger of corporations generally and included an appraisal remedy for dissenters. N.J. Laws 1896, ch. 185, § 108, at 312. Delaware followed suit three years later. 21 Del. Laws 1899, ch. 273, § 56, at 463. The remedy was limited to mergers and consolidations.

One Delaware court has made the following explicit comment on the historical purposes of the appraisal statutes:

> At common law it was in the power of any single stockholder to prevent a merger. When the idea became generally accepted that, in the interest of adjusting corporate mechanisms to the requirements of business and commercial growth, mergers should be permitted in spite of opposition of minorities, statutes were enacted in state after state which took from the individual stockholder the right theretofore existing to defeat the welding of his corporation with another. In compensation for the lost right a provision was written into the modern statutes giving the dissenting stockholder the option completely to retire from the enterprise and receive the value of his stock in money.

Chicago Corp. v. Munds, 20 Del. Ch. 142, 149, 172 Atl. 452, 455 (1934).

Some further discussion of the background of the appraisal statutes appears in Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L.Q. 420 (1930); Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 HARV. L. REV. 233 (1931); Ballantine & Sterling, *Upsetting Mergers and Consolidations: Alternative Remedies of Dissenting Shareholders in California*, 27 CALIF. L. REV. 644 (1939).

Since the function of the appraisal provision was to save the constitutionality of the merger statute and cut off the dissenter's action for injunction, it is arguable that shareholders to whom appraisal is available should be restricted to that remedy. Some of the statutes specifically state that the appraisal remedy is "exclusive." See, *e.g.*, CAL. CORP. CODE § 4123 (1955); MICH. STAT. ANN. § 21.44(2) (1935); PA. STAT. ANN. tit. 15, § 2852-515(k) (Supp. 1961). On the other hand, a few states expressly indicate that the appraisal statute is not the stockholder's exclusive remedy. See, *e.g.*, KY. REV. STAT. ANN. § 271.415 (4j) (1960). Some courts have construed appraisal statutes as the exclusive remedy of a dissenting stockholder. See, *e.g.*, McGhee v. General Finance Corp., 84 F. Supp. 24 (W.D. Va. 1949); Morris v. Columbia Apartments Corp., 323 Ill. App. 292, 55 N.E.2d 401 (1944); Geiger v. American Seeding Mach. Co., 124 Ohio St. 222, 177 N.E. 594 (1931) (dictum). Aspects of the problem of exclusivity of remedy are discussed in Note, *Interplay of Rights of Stockholders Dissenting from Sale of Corporate Assets*, 58 COLUM. L. REV. 251, 255 (1958). The Connecticut language is unusually explicit in making the remedy exclusive. CONN. GEN. STAT. REV. § 33-373(f) (1962).

Probably the best generalization is that the courts will still enjoin a transaction if it strikes them as grossly unfair, but they are less disposed to find that degree of unfairness if the plaintiff has the remedy open to him. This is likely the proper interpretation of the difference between the *Keller* case in Delaware and the *McNulty* case in New York, discussed earlier. See notes 11 and 15 *supra*. This approach represents a relatively refined stage of judicial development, for it means that the modern court will not today enjoin the transaction without a substantive showing of severe economic injury to the plaintiff—an inquiry that a nineteenth century court would not have found necessary.

tion of enterprises on various economic groups; the problem at hand was the effect of the combination of the "corporations" upon the only group that had a stake in the "corporations"—the shareholders.

The early statutes, and still a majority of them, gave the appraisal remedy to shareholders of all the merging corporations. But was this conceptually necessary? If corporation A merges with corporation B, are we not worried mainly about the shareholders of A since theirs are the shares transmuted, B shareholders remaining B shareholders throughout? On this theory, some states, such as New York and Connecticut, restrict the appraisal remedy to the shareholders of those corporations that "terminate" as a result of the merger, unless the preferential rights of the stockholders of the surviving corporation are affected.[39] Evidently the economics of the combination are the same whether A corporation or B corporation "terminates," and whether A or B "dies" has nothing to do with the question whether A's shareholders or B's shareholders got the worst of the deal. It is a lawyer's choice whether to run A into B or B into A. At least the New York and Connecticut rule cuts down on the number of dissenters—probably by well over half—and that was likely its purpose.[40]

There would never have been appraisal statutes of the kind we now have if the courts had not balked at the constitutionality of the statutory merger. Under modern views of a business enterprise no court would conceivably hold a statutory merger unconstitutional because not accompanied by an appraisal opportunity. And no economic arguments exist for singling out from Lists I, II, or III, the particular formal device of merger for such special treatment. The appraisal remedy as applied to mergers is a pure anachronism—a residual adaptation to an extinct theological problem.

39. CONN. GEN. STAT. REV. § 33-373(c) (1962); N.Y. STOCK CORP. LAW § 87 (McKinney 1951, Cum. Supp. 1962).

40. Some states have been struck by the apparent anomaly of a merger between a parent and its wholly owned subsidiary. Unless generating an amendment of the parent's articles as a by-product á la Hottenstein v. York Ice Mach. Corp., 136 F.2d 944 (3d Cir. 1943), note 14 *supra*, this transaction is so transparently conceptual that some statutes deny the appraisal remedy to such mergers. *E.g.*, N.Y. STOCK CORP. LAW § 85(7) (McKinney 1951); ILL. REV. STAT. ch. 32, § 157.70 (1957). But this instance is actually no more than a particular case of a whole set of more general anomalies. There are many other kinds of paper mergers. And what of controlled subsidiaries, or mergers between corporations under common control? And if it is all conceptual anyway?

Then there is the matter of consolidations, where all the participating corporations "terminate" and a new one is "born." Connecticut and New York, having restricted the appraisal remedy to shareholders of the terminating corporation in a merger, proceed, with a certain conceptual logic, to give the remedy to shareholders of all corporations in a consolidation. The merger and the consolidation are economically indistinguishable, of course, and this rule means that again the shareholder's remedies depend on "form," and that is said to be very bad.

One may attack or defend almost any position he wishes on these matters. It will be found that "logically" one may do most anything; that no matter what is done "inconsistencies" remain; and that all the arguments are so stratospherically conceptual that only angels on a pin have the talents, interest, or time for the job.

Other "Fundamental" Changes

The perspectives and vocabulary of the nineteenth century conceptual view of the "corporation" are extremely difficult to wring out. An illustration is that even in the most modern corporation casebooks and statutes it is an unchallenged convention to group together under a title such as "Fundamental Changes" all legal transactions that affect the articles of incorporation, that alter the "organic character" of the "corporation itself."[41] Mergers and consolidations are invariably considered under this head; so are dissolution, charter amendments and, less confidently, some sales of assets. Bankruptcy and economic events like those listed here earlier are not "fundamental"; a charter amendment changing the corporate "situs" is "fundamental."

All of these "fundamental" matters revolve around the articles of incorporation and some underlying notions about shareholder "ownership" of, and vested contract rights in, the "corporation." On the field of intracorporate procedure, a great battle has been fought, more or less consciously. The collective economic enterprise was probably a necessity in the growing social economy of the United States; whether or not it was a necessity, it was surely a winner, with a high survival value. Old rules requiring unanimity for action by the homely small enterprise could no longer work for the large impersonal collectivity, particularly as the pace of economic movement and decision accelerated. New procedures developed as the need required.

The *Dartmouth College* case represented one round in the continuing struggle—the struggle between mobility of control and fixity of charter.[42] Following the decision in the *Dartmouth College* case, every state enacted provisions reserving to the state the "power" to amend charters issued subsequent to the statutes.[43] Then, by a somewhat fuzzy and unacknowledged delegation, the corporation acts announced that the shape, form, and content of the "corporation" could be destroyed, altered, or amended not by the legislature but by a designated majority of the shareholders.

It sat most uneasily upon the nineteenth century mind to say that a majority of the shareholders could, by any means, alter the claim of an individual shareholder "in" the corporation. As a result, the corporation acts provided, and still provide, for special protections, and for elaborate, formal, and public procedures to solemnize so significant an occasion. Long periods of notice and publication are required; public filing and recording are a prerequisite to "effecting" the change; special voting arrangements are prescribed, calling for voting by class and for special and high majorities; by more modern regulation, the event is celebrated with further dignity and pomp by much filing and mailing about of proxy statements and proxies; and the occasion is usually capped by a formal conclave at which there are many lawyers in attendance, bearing many

41. See, *e.g.*, Conn. Gen. Stat. Rev. pt. IX (1962); Baker & Carey, Cases and Materials on Corporations ch. X (3d ed. 1959); Ballantine, Lattin & Jennings, Cases and Materials on Corporations ch. XIII (2d ed. 1953).

42. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1818).

43. See 7 Fletcher, Cyclopedia of Corporations §§ 3670-71 (1931).

papers—the importance of the whole in the eyes of all being assured by the ultimate fact that it is very expensive.

In large measure these actions are ritualistic in character—always a sure sign that men are seeking to cope with a supranatural problem, a problem of the occult, the religious, or the ideological.

In this view of the matter, having found the appraisal remedy to be part of the ritual applied to mergers, one would expect to find it in the company of other "fundamental" corporate changes as well. In general, this guess would be a good one, but at this point the statutes lose their unanimity and begin to spray.

Dissolution

If it is serious surgery to change any part of the "corporation," it is much more serious to bring about its "death" by dissolution. By this logic, one might expect to find the appraisal remedy available to the shareholder dissenting from dissolution. In fact, however, no statute provides for it.

The main reason may have been that appraisal did not seem to be an appropriate or feasible remedy for the purpose. It was generally assumed that following upon dissolution of a corporation, all the corporate assets would promptly be turned into cash and distributed *pro rata* among the shareholders after the creditors were paid. According to this conception, all shareholders were about to be paid the "value" of their shares. Appraisal would be of no interest or use to anyone. In fact, of course, this analysis is erroneous in situations when the liquidation of the assets is spread out over many years, or where assets are not distributed in cash; or where the enterprise is broken-up after the dissolution, and it is found that the shareholders ultimately receive less than the amount they would have received as their *pro rata* share of the company's going concern value on the day dissolution was voted. In each of these cases, and perhaps others, it would be an advantage to the dissenting shareholder to be able to look to an appraisal remedy rather than wait around for his share of the liquidating distribution. But this is not the kind of analysis that was in vogue at the end of the last century.

On the other hand, the explanation just suggested may itself be biased off target by its twentieth century origins. It is not easy to think with the mind of others. Perhaps to the nineteenth century analyst, dissolution just did not seem as much a trauma as merger. Death was more "natural" than change; horses die more often than they change into cows. Perhaps the shareholder "assumed" the risk of dissolution and distribution, and that was the end of the thinking on the matter.[44]

44. There may be some indication of this attitude in those appraisal statutes that give the remedy to dissenting shareholders where the other shareholders have voted to extend the "life" of a corporation that was originally limited in its duration. See Appendix, Group IV. These provisions on "reverse dissolution" are superb illustrations of the kinds of things that seemed important under nineteenth century corporation law. Isn't it a little odd, though, that the extension of corporate "life" raises the appraisal remedy in these states

Whatever the mental processes involved, dissolution gives rise to the appraisal remedy under no statutes while merger yields the remedy under all statutes. It is worthwhile to look at these two propositions side by side for a moment.

If Corporation A merges into Corporation B, the enterprises are combined, A shareholders become B shareholders, and, under most statutes, shareholders of both A and B have the appraisal remedy open to them. As has been suggested previously, it is hard to see why, even by nineteenth century reasoning, the shareholders of B should have this privilege; the only thing that happened to them was economic, and that doesn't count. On the other hand, the only conceptual thing that happened to Corporation A was that it went up in smoke. By force of the merger, Corporation A was dissolved. Yet it is agreed that in a dissolution shareholders are not entitled to the appraisal remedy. Then why should the A shareholders have the remedy in the merger with B?

The best answer available is pretty lame. One can say, if he wishes, that the difference is that in the merger the A shareholders received B stock. This answer keeps the player alive for only one more move. What if Corporation A *bought* the B stock, then dissolved and distributed the B stock to its shareholders? Here there is no appraisal remedy, either on the purchase or on the dissolution.[45]

What emerges is that the rule on appraisal in mergers is "inconsistent" with the rule on appraisal in dissolutions. This is flagrantly apparent under the Connecticut and New York rule limiting the remedy in mergers to shareholders of the terminating company. It is even more profoundly true under the Delaware and majority rule giving the remedy to all shareholders involved, for now not only do the shareholders of A receive the remedy where they would not if their own corporation were dissolved, but the shareholders of B receive it where the only thing that happened was that some *other* corporation was dissolved.

Charter Amendments

Merger and dissolution of a "corporation" seemed to be assassination; a charter amendment was less conceptually serious, more like amputating, or grafting on, a limb. But the appraisal remedy also seemed more suitable to the occasion of the charter amendment than to the dissolution. We find, therefore, as we might suspect, great scatter in the appraisal provisions dealing with

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while dissolution of a "perpetual" corporation does not have this effect? Corporations with a limited duration have almost disappeared in practice today so that none of this makes much difference.

A still different aspect of the problem of dissolution is met by a few statutes such as CONN. GEN. STAT. REV. § 33-384 (1962). This section provides that if a minority is seeking to force a dissolution of the corporation, other shareholders may compel the complainant to accept cash for his shares. See CAL. CORP. CODE § 4658 (1955); N.C. GEN. STAT. § 55-119(b) (1959).

45. The other answer is, of course: Let the former A shareholders sell their B stock. But that is a practical response and therefore not permitted by the rules of the game.

charter amendments. Thirty-six jurisdictions have nothing on the point; none gives the remedy for all amendments; the remaining sixteen statutes grope for a way of saying that the remedy is available if the charter amendment is "serious."[46] What is serious?

About half of the statutes dealing with amendments include as triggering transactions any amendment to the purposes and powers clause of the articles. A complete revolution in the company's *actual* line of business yields no remedy, of course. We should have expected this, though it is a continuing source of astonishment to see the manifested strength of the conceptual view of the "corporation." In contemporary corporate life, *ultra vires* has almost totally disappeared; modern statutes have all but declared "purpose and powers" clauses surplusage, and few amendments to the articles of incorporation can be thought of that have *less* actual effect on shareholders. But it is the "corporation" that matters, and the most distinguishing feature of a corporation, that which uniquely gives it its own special personality as a horse or a cow, is its purposes clause. Q.E.D.

The other charter amendment that most commonly gives rise to the appraisal remedy is an amendment that changes stock preferences or reclassifies shares.[47] This fits the classical pattern of conceptual concern about the change of preexisting contract rights. It also comes closer than anything we have seen so far in directing the remedy to someone who may be economically hurt and need it. When the cumulative dividend provisions of a preferred stock are being eliminated by amendment, contract doctrine and economic injury may finally join hands. Whether the appraisal remedy should be made available in such a circumstance is another question.

Should the shareholder be able to demand appraisal if the charter is being amended to the benefit of his own class of shares? That result does not sound appealing. The tendency is, therefore, to say either by word of legislature or of court, that the claimant must have been adversely affected. That sounds much better, moves the statute even closer to a sensible rule of economic policy—and creates the kind of problem that New York has encountered.

The 1943 New York amendment[48] had a clear objective: to avoid Delaware's *Keller* result—to induce the New York courts to permit amendments wiping out dividend arrearages on preferred stocks, a pursuit popular among common holders, managements, and corporate law firms. The appraisal remedy was limited to its particular purpose. Preferred shareholders were given the appraisal remedy if their shares were "adversely affected" by a merger or charter amendment. The statute worked; the New York court declined to follow Delaware, rejected the "vested rights" argument, and upheld amendments cleaning off preferred arrearages.[49]

46. See Appendix.

47. Some eight or nine statutes provide for the appraisal remedy against such amendments. See Appendix, Groups IV & V.

48. N.Y. Sess. Laws, 1943, ch. 600.

49. McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945), discussed in notes 15-16 *supra* and accompanying text.

This statute was a modern tactical maneuver by sophisticated financial lawyers who were thinking in the most functional of political and economic terms and were willing to trade off a limited appraisal remedy to gain a longer leash for corporate reorganizations.[50] Thoroughly practical in its short range objectives and effect, it has proved less practical from the standpoint of long range administration. How can one tell, until a court tells him, whether an amendment to articles of incorporation will "adversely affect" preferential rights?

Even the simplest situation is very difficult to judge—the classical equity reorganization. Assume a corporation that is behind on its preferred dividends, needs new capital, cannot borrow it without an accompanying injection of new equity money and cannot get the equity money because new money will not come in junior to the stacked up preferred dividends. The obvious remedy is to amend the articles to get rid of the preferred arrearages, issue the new equity and debt, and get on with the economic work of the enterprise. It was done again and again in the 1930's, invariably with a vast majority of the preferred going along because this seemed preferable to waiting until the corporation went to its creditors, leaving the preferred with neither dividends nor redemption or liquidation pay-out. If the reorganization proved successful, as many did, was it clear that the preferred had been "adversely affected" by giving up its right to arrearages? It does not seem very clear to me. And this is an extreme case—the easiest in the sense that in this situation the amendment is aimed precisely at that most sacred of the preferred's rights, his back dividends.

The New York courts have had to tangle with harder cases. In *Matter of Kinney*[51] the issue was whether a charter amendment reducing the stated capital attributable to a corporation's *common* stock gave an appraisal remedy to the preferred under a provision granting the remedy if preferential rights of the preferred were changed by an amendment. The court granted the remedy in a highly questionable opinion reminiscent of the last century in the seriousness with which "stated capital" and a conceptual reclassification of a surplus account were regarded. The *Kinney* case arose before the "adversely affected" language was added to the appraisal provision. How should it be decided now? If changes in the stated capital of the common "adversely affect" the preferred, then some argument can be found in almost every case of charter amendment to demonstrate a possible future potential injury to the plaintiff who is seek-

50. It is interesting to observe the relative roles played by the economic and the conceptual in this tactical statute. (i) The New York remedy is limited to one constituency of the corporate enterprise, the shareholders; (ii) it is limited to one legal subcategory, the "preferred" who may have a "vested right"; and (iii) it is triggered by an amendment to the certificate of incorporation. So far, this respresents pure nineteenth century non-economic thinking. The New York statute then introduces the notion of economic injury to curtail the scope of the remedy and the number of claimants. The statute does not set off the appraisal remedy in response to an economic loss, though it may look that way at first. It works just the other way. The premises for the remedy are all taken from the last century; the economic element is used to restrict the remedy, not ground it.

51. 279 N.Y. 423, 18 N.E.2d 645 (1939).

ing appraisal. The New York court seems largely to have given up on such questions. In *Matter of New York Hanseatic Corp.*, decided in 1951, the court threw up its hands and said: "When . . . the result of the alteration is not entirely clear, the wishes of the stockholder rather than the conception of the courts shall prevail."[52] This very nearly means that the shareholder dissenting to an amendment may have the remedy if he dissents. And the effort of the statute makers to introduce an economic criterion of injury has been largely nullified. At a minimum, it is proving exceedingly difficult for management, or more accurately for its lawyers, to assess this kind of nebulous "adverse effect" in advance of the transaction—in time for the "Go; No go" decision to be made on the corporate transaction.

The problem was inherent in the New York statute, bound to arise, and certain to be cranky. For here we are seeing re-enacted an episode that has occurred countless times in the law and will ever continue to recur. The law is often faced with a choice between two courses. One course is relatively predictable, and administrable; it is also conceptual, formal, and in its results silly. The other is relatively functional and sensible; it is also unadministrable, unpredictable, and in its results unworkable. The appraisal statutes giving the remedy wherever there is any change in a corporate purpose clause have chosen the first course; the New York statute and others like it seeking to import a standard of "adverse effect" have chosen the second. And the law rocks between them.

Sale of Assets

The early American statutes did not provide an appraisal remedy for dissenting shareholders where the corporation sold all of its assets. The "corporation" was not affected by the sale of its assets any more than the ship is changed by removing its cargo. At least this seems a convincing explanation on the surface. But in fact it is wobbly. The law of the nineteenth century was ambivalent about corporate sales of all assets. From one viewpoint, a sale of assets seemed merely an economic operation and therefore not very important; when *all* assets were sold in a lump, however, the transaction took on some of the color of being "fundamental."

The key to this conceptual ambivalence may have lain in the term "franchises." A corporation could sell all its office equipment, plant, and inventory and still remain a "corporation" intact; but if it sold all its "assets, rights and franchises," and if the distinguishing identity of the "corporation" was the "franchise" granted by the legislature, then something had been subtracted from the corporate "entity" by the sale. Notice what the nineteenth century statutory provisions on sales of assets actually say. The common law rule forbade a corporation to sell its assets if a shareholder objected.[53] When statutes

52. 200 Misc. 530, 536, 103 N.Y.S.2d 698, 702 (Sup. Ct. 1951). The Connecticut statute tries to meet the problem by specifying the changes in preferred shares that are "serious" enough to give rise to the appraisal remedy. CONN. GEN. STAT. REV. § 33-373(a) (1962).

53. Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921); BALLANTINE, CORPORATIONS § 281 (1946).

came along in the late 1800's authorizing the sale upon consent of a specified majority, they typically read: "[the corporation] *may*... sell, lease or exchange *all* of its property and assets, *including* its goodwill and its corporate *franchises.* . . .[54] The language is granting language, permissive in character and invariably emphasizing "franchises." These statutes were contemporary companions of the merger statutes, were passed for the same reasons as the merger statutes, and are cut from the same conceptual cloth.

Our corporation statutes today continue to carry these provisions on sales of assets. Our twentieth century minds pick out the fact that the statutes call for special votes of shareholders, and we therefore seek to explain or justify the provisions as protective restraints against overcentralized managerial control of an unusually important economic transaction—selling out the business. To us they seem to be administrative attempts to meet a problem of economics and politics. Typically, we accept uncritically the nineteenth century conclusion that somehow sales of assets are terribly important, but then drop the conceptual premises behind the conclusion and try to find new "functional" arguments to support our inherited conclusion. Occasionally we are confronted with annoying evidence that our forefathers were either wretched draftsmen, or had a different set of purposes in mind when they wrote the statutes: in this situation we always assume the former. How about a sale of *most* of a corporation's assets? That may be the functional equivalent of selling all of them—if our concern is to preserve the role of the shareholders' vote. We have smiled that our ancestors should have missed a point so obvious, and have moved to correct their inadequacies by amending the provisions on sales of assets to add the phrase "or substantially all assets." But if the purpose of the original statute was a permissive grant to the "corporation," this phrase was never needed; a corporation that could legally sell *all* its assets, even its "franchises," could certainly sell less than that if it wished. New York, finding the old statutory language not to fit the new reasons very well, has grimly hung on to the old conclusion, but modified it even more to give it a twentieth century economic ring. Under the New York provision, shareholders must vote if all or substantially all the assets, or an "integral part" of the assets essential to the conduct of the business of the corporation, are sold.[55] But this way of looking at things should

54. See DEL. CODE ANN. tit. 8, § 271 (1953) (emphasis added). The Delaware statute has read substantially this way since its adoption in 1899.

55. N.Y. STOCK CORP. LAW § 20 (1954).

New York's effort here to convert a conceptual rule into an economic regulation is precisely parallel to its effort to limit the appraisal remedy to shareholders who are "adversely affected." Unfortunately, the results of this endeavor have again been frustrating—even more so under the provision on asset sales than under the charter amendment provision. No one knows what an "integral" asset is, and lawyers have not been able to predict when and when not to call for a shareholders' vote. The provision scares mortgagees and bank lawyers to death, and has proved a litigation breeder. See Eisen v. Post, 3 N.Y.2d 518, 146 N.E.2d 779 (1957), noted 67 YALE L.J. 1288 (1958); *In re* Schutte, 114 N.Y.S.2d 162 (1952), *mod. on other grounds sub. nom. In re* Kunin, 281 App. Div. 635, 121 N.Y.S.2d 220 (1953), *aff'd*, 306 N.Y. 967, 120 N.E.2d 228 (1954); Petition of Avard, 5 Misc. 2d 817, 144 N.Y.S.2d 204 (1955). Again the choice seems to be between workable silliness and sensible unworkableness.

not be attributed to the legal work of the last century. We are putting chrome plate on a whale oil lamp. If the appraisal statutes have been uncertain about how to handle the sale of assets it was originally because legal thinkers of the earlier period were uncertain of the conceptual location of the asset sale.

It would not have been surprising if it had been thought necessary to provide the appraisal remedy to shareholders objecting to a sale of assets at least where the corporation in fact did dispose of its "franchises." Yet, though the case was close, neither Delaware nor New Jersey apparently felt it necessary in the 1890's to include the appraisal remedy in order to preserve the constitutionality of the provision permitting all assets and franchises to be sold.

Over the years, however, more and more states have added the sale of all assets as a triggering transaction affording dissenting shareholders the appraisal remedy. Some of these statutes are more refined and limited than others, but lumping them all together, there are thirty-eight statutes in effect today that cover sales of assets in some measure.[56]

The conceptual arguments that supported the appraisal remedy in the case of mergers were not good enough in the case of the sale of assets even to persuade the nineteenth century mind. Arguments of that character are not considered persuasive to the twentieth century at all. And there are absolutely no practical or economic arguments that would lead us to select out assets sales as peculiarly dangerous to shareholders—more dangerous than all the other events on our Lists I, II, or III. Why, then, are the states falling into line in favor of the appraisal remedy in the case of sales of assets? Because, it is said, a sale of assets is "just like" a merger, and we already have the appraisal remedy in the case of a merger. We must be "consistent."

Most asset sales manifestly are not "just like a merger." But one situation has recurrently disturbed commentators and courts. Assume a jurisdiction in which a shareholder of Corporation A may claim the appraisal remedy if Corporation A is merged into Corporation B. The results of this transaction are that: the former assets of A are now joined with those of B; the only remaining "corporation" is B; A disappears into the void; former shareholders of B remain shareholders of B; concurring shareholders of A wind up as shareholders of B; and dissenting shareholders take cash for their shares and go home. Now assume another transaction. This time Corporation A does not merge into Corporation B but instead sells all its assets to Corporation B for securities of B, and thereupon A dissolves, distributing the B securities to its shareholders in liquidation. The consequences of this transaction are: the former assets of A are now in B; A disappears; former B shareholders remain B shareholders; concurring shareholders of A wind up as shareholders of B. The transactions are, in result, identical. Therefore, the argument goes, they should be treated equally and the appraisal remedy should be extended to sales of assets. If we do not extend the remedy to sales of assets, substantive rights of shareholders will turn on mere form; clever lawyers can juggle the papers to make

56. See Appendix.

the transaction a sale or a merger; and, viewed functionally, our law will be "inconsistent."

On the basis of these arguments, the legislatures have steadily been expanding the remedy to sales of assets.[57] And, spurred on by these arguments, the courts, especially those of Pennsylvania, have moved in the same direction on their own without special assistance from the legislature—some would say in spite of the action of the legislature. In the absence of a statutory appraisal remedy in a sale of assets, the Pennsylvania courts have proved themselves able to discover that apparent sales of assets were "really" mergers. Interested in function and substance, they have been able to see through the "form"—the fact that the documentation was all in terms of sale, and that none of the statutory procedural steps required for a merger were taken—to detect the underlying "reality," a merger.[58] These decisions are utterly fascinating. In an effort to pursue function and to avoid formalism, they end up in a blaze of Platonism, finding a "true and real merger" that exists beyond, and is merely reflected in, the merger statutes.

How good are these arguments that have moved legislatures and courts to extend the appraisal remedy to the sale of assets? I think they are very bad indeed. They are considerably worse in their semi-sophistication than the unsophisticated conceptualism of the nineteenth century.

Consistency

The dominant urge involved here is for "consistency" and for a set of rules that does not turn the result on the form of the transaction. This position implies that: (1) we know what "consistency" is; (2) it is a good thing; and (3) extension of the appraisal remedy to sales of assets will have the effect of furthering "consistency" and reducing the consequence of form. The first and third of these are false, and the second is a sometimes thing.

Start with assumption (2). Consistency in the law is a tertiary virtue at best. Presumably consistent idiocy is not to be preferred to intermittent idiocy. If there is no good reason whatever for retaining the appraisal remedy in the

57. The commentators have urged or concurred in this expansion. 3 OLECK, MODERN CORPORATION LAW § 1286; Skoler, *Some Observations on the Scope of Appraisal Statutes*, 13 BUS. LAW. 240 (1958); Note, 38 VA. L. REV. 915 (1952); Note, 47 CALIF. L. REV. 180 (1959). *But cf.* Comment, 72 HARV. L. REV. 1132 (1959).

58. Farris v. Glen Alden Corp., 393 Pa. 427, 143 A.2d 25 (1958); noted 107 U. PA. L. REV. 420 (1959); 72 HARV. L. REV. 1132 (1959); 59 COLUM. L. REV. 366 (1959); Bloch v. Baldwin Locomotive Works, 75 Pa. D. & C. 24 (Del. Co. 1950); Marks v. Autocar Co., 153 F. Supp. 768 (E.D. Pa. 1954); Troupiansky & Sons v. Henry Disston & Sons, 151 F. Supp. 609 (E.D. Pa. 1957), noted in 46 CALIF. L. REV. 283 (1958).

After the Glen Alden decision, Pennsylvania amended its statute to grant an appraisal right to stockholders of a company which acquires all (or substantially all) the property of another company by issuing shares or evidences of indebtedness if the acquisition is accomplished by the issuance of more than a majority of the voting shares of such corporation that will be outstanding immediately after the acquisition. PA. STAT. ANN. tit. 15, § 2852-311 (Supp. 1961).

case of mergers, and if the rule on mergers is "inconsistent" with that on sale of assets, and if we want "consistency"—we should not extend the remedy to the sale, but repeal it in the merger.

Now for assumption (3). Are we in a more consistent position after we have extended the appraisal remedy to sales of assets? Clearly not.

If we give the appraisal remedy to the shareholder of Corporation A when A sells all assets to Corporation B for securities, and then A dissolves, distributing the securities in kind, we do succeed in treating the shareholder of A "consistently" with the way he would be treated if there were a merger of A into B. In addition, however:

No. 1. The statute does not, with this extension, give the shareholder of the purchasing corporation an appraisal remedy. It thus does not treat a shareholder of B consistently with its treatment of him in the case of a merger, if the statute is one that gives the appraisal remedy in a merger to all shareholders—as virtually all the statutes do. The shareholders of A and B are not treated "consistently"—and in two different senses.

No. 2. If the statute is one of those few that limit the appraisal right to shareholders of the terminating corporation, then both A and B shareholders are treated as though there were a merger of A into B—if the deal is arranged so the securities of B are issued to A and A's assets are transferred to B. But what if counsel transfers B's assets to A for A's securities, perhaps as a fillip, changing A's name to "B" when B dissolves?[59] The merger and asset sale remain parallel, all right, but in order to achieve this result, we have had to submit to the lawyer's choice of form the issue whether A's shareholders or B's get the remedy.

No. 3. The argument for extending the remedy to sales of assets focuses entirely on the problem of consistency between asset sales and mergers. What about consistencies among other transactions?

- To give the shareholder of A appraisal rights on asset sale and dissolution of A is "inconsistent" with the uniform denial of the remedy in dissolutions. Earlier it was pointed out that the appraisal remedy on mergers is itself inconsistent with the lack of remedy on dissolution.

59. This was done in Lauman v. Lebanon V. Ry. Co., 30 Pa. 42 (1858), discussed in note 20 *supra.* The court's reaction was marvelous:

> No one will deny that an association of individuals becomes a corporation, when, by authority of law, it acquires a name by which its *legal* identity can be preserved through all the changes of membership, business, constitution, and sphere of action which it may undergo, and which may entirely destroy its *actual* identity. *Such* a name is essential to corporate existence, and when it is given up, the corporation ceases to exist.

Id. at 45.

Nearly one hundred years later, this incredible excerpt was quoted and relied on by the court in Bloch v. Baldwin Locomotive Works, 75 Pa. D. & C. 24, 36-37 (Del. Co. 1950). The change of the corporate name of the purchasing corporation appears to have been the straw that this modern judge's back could not carry, and the result was an award of the appraisal right to the dissenting shareholder of the *purchasing* company!

This inconsistency is even more glaring if the remedy is given where dissolution follows a sale of assets, but disallowed where a sale of assets follows dissolution.

— Where there is a sale there is a purchase. If A transfers cash to B for B's securities, which bought and which sold? If A transfers land for B's securities, which bought and which sold? Nobody cares in most situations, but if the remedy of appraisal goes only to shareholders of the "selling" company, which company gets it? Why? Is any answer more, or less, consistent than any other?

— No statute provides for the appraisal remedy on the issuance of stock. No one argues for the remedy in such case, and it would be quite unadministrable. But so long as this is so, from the standpoint of B's shareholders another basic inconsistency is already built in between a merger in which B "survives" and the issue by B of its securities for cash or other assets of A or for cash with which to buy A's assets. To which of these inconsistent rules should the rule on asset sales be made "consistent"?

— All of the cases in which the court reclassifies a sale as a "merger" involve a transfer of A's assets for B's securities, followed by distribution of the B securities. If B sells the securities for cash, and buys A's assets for cash, then apparently there is no "merger." Is that consistent? Then A takes the cash and buys B's securities. Now a merger?

Enough of this, though it can be easily expanded by the reader as a parlor game for a sleety night.[60] "Consistency" cannot be obtained here, because the pre-existing situation to which we are seeking to become "consistent" was itself internally inconsistent. The more we succeed in becoming consistent with this standard, the less consistent we become.

This brings us to premise (1) underlying the pressures to extend the appraisal remedy—the notion that "consistency" is a single thing, that we will all recognize it when we see it, and detect its absence when it is not there.

Whatever value "consistency" may have in the law—and in my view that value has been grossly overvalued in legal literature—it is never a useful guide if not preceded by a great deal of hard intellectual labor. That labor must be devoted to identifying, isolating, and agreeing upon the particular set of axes or standards by which "consistency" is to be judged. To be useful, these axes must be selected on a single level of discourse, and our efforts to rearrange affairs "consistently" with respect to the chosen axes must also be conducted at the same level of discourse.

Because of its failure to meet this requirement, the argument for extending the appraisal remedy to sales of assets is rotten at the core. It attempts to line up and control results occurring at the economic or business level by readjusting conceptual categories like "merger," "amendment," and "sale" that live

60. One court has gotten itself mired into a similar analysis—but finally found a way to give the plaintiff an appraisal remedy. One should not miss the opportunity to read Applestein v. United Board & Carton Corp., 60 N.J. Super. 333, 159 A.2d 146 (1960), *aff'd*, 33 N.J. 72, 161 A.2d 474 (1960). See Kipp & Ward, *Corporations Survey of the Law of New Jersey*, 15 RUTGERS L. REV. 217, 233-34 (1961).

only on a legal level of discourse. This cannot be done. The appraisal statutes graphically illustrate its futility.

The economic results of the appraisal statutes could be made "consistent" by applying economic criteria. We could provide that a shareholder may leave the enterprise anytime he wishes and turn in his shares for cash. Or we could provide that any shareholder who is economically adversely affected may have the appraisal remedy. These rules might be bad policy or unadministrable, but they are "consistent" in that their results turn upon the same standard in all cases.

Or we can build a conceptual consistency. We could provide that the appraisal remedy should be available only where the "corporation" is organically changed. Applying this standard of "consistency" we would probably conclude that it is inconsistent to permit an appraisal remedy for a sale of assets but that we should extend the remedy to dissolutions and to all charter amendments. Again, this might be absurd policy. But it is *a* way of making decisions, and at least we can in a particular situation tell which direction to move in if we want to advance along the particular axis of consistency we have chosen.

What we cannot do is to hope for a set of consistent results at one level in response to a juggling of categories on another level. The Pennsylvania courts and the legislatures and the commentators may strain and struggle all they will to try to line up mergers, sales, dissolutions and the like in such a way that the shareholders receive the same economic treatment whenever the same economic circumstances occur—and they will find that it cannot be done. It cannot be done because the levels of discourse have no points of contact. No matter what grids we scribe on our glasses, the river flows by unheeding.

In the last century the appraisal remedy was given in mergers out of concern for a deeply held body of concepts. Now that we have rejected those concepts, we are extending the remedy to sales of assets in pursuit of a symmetry that cannot be attained with a rule that cannot be supported. This is at least as revolting a reason for a rule of law as that it was laid down by Henry IV.[61]

Some Recommendations for Tomorrow

How might we go about developing a sensible body of law providing for the appraisal remedy?

We should begin by scrapping (to the extent that one ever can) all of our past thinking about the topic. It is infected with its conceptual and irrelevant ancestry. Evolution in this case will not work. We should start over.

The second step is to reset the problem into functional economic terms. The appraisal remedy is of virtually no economic advantage to the usual shareholder except in highly specialized situations. The remedy is, or can be, a substantial nuisance to the remaining shareholders and to the enterprise as a whole. Enterprises should not be required to stay liquid to stave off appraisal claims.[62]

61. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

62. An interesting adaptation to this problem may be suggested in Iowa where, in certain cases, the majority shareholders not the corporation must purchase the shares of the dissenters. IOWA CODE ANN. § 491.25 (1949).

Similarly, the need of the enterprise to make rapid decisions should be kept firmly in mind. These considerations counsel against any extension of the appraisal device except in cases of extreme and extraordinary need.

It may well be that we do not need the appraisal remedy for shareholders at all. It is clear beyond question that shareholders as a lot have little or no real concern with the kinds of transactions—the "fundamental" transactions—to which the appraisal remedy has been linked in the past. It is commonplace to observe that the modern shareholder is a kind of investor and does not think of himself as or act like an "owner." He hires his capital out to the managers and they run it for him; how they do it is their business, not his, and he always votes "yes" on the proxy. Historically we got off on to the remedial route of appraisal only because of ideological problems—problems that have largely disappeared. We never have tried to use it to help solve economic problems of the enterprise. Shareholders have been cheerfully carrying all kinds of real economic risks without the benefit of an appraisal remedy. When the appraisal remedy has been available to them, it has been much like finding an Irish Sweepstakes ticket—not earned, unrelated to their work, usually worth nothing, and once in a great while, a windfall. Most likely we do not need the appraisal remedy anywhere, and the statutes should simply be repealed.

If we are to have the remedy at all, the key point on which it should turn is the presence or absence of a market. If the remedy has any function, it is to provide a way for an unhappy investor to get out when he has no other feasible way to get out. The remedy should not be thought of as a punishment for management, and triggering transactions should not be selected on the theory that they are "fundamental" or that they are immoral. Neither should sheer economic risk of loss be sufficient justification for the remedy. Appraisal should be considered an economic substitute for the stock exchange and its use should be limited to situations in which the exchange, or some kind of a reasonable market, is not available. An example of this "no market" philosophy appears in the North Carolina and Connecticut Corporation Acts. Under those Acts the shareholder is entitled to appraisal if the corporation distributes to him in kind an essentially unsaleable undivided interest in property—something handy like an undivided 283/426,724ths interest in an overriding royalty payment.[63]

Whatever events are selected to trigger the remedy, improved procedures are badly needed. Valuations cannot be made overnight, but a good deal more attention could be devoted to streamlining the procedures and giving to them a sense of urgency.

The appraisal remedy is today limited to shareholders primarily for historical and conceptual reasons. Thought should be given to the usefulness, if any, of the appraisal approach for other groups who have an economic stake in the enterprise in addition to the shareholders. As a generalization, our law does not relish the sight of someone being dragged kicking and screaming against his will. On its face, the appraisal and bail-out has a deep appeal to American instincts for finding ways to accommodate the demands of the majority and the

63. CONN. GEN. STAT. REV. § 33-373(e) (1962); N.C. GEN. STAT. § 55-119(b) (1960).

wishes of the minority. Perhaps it would be found that the buy-out remedy is suitable for equity holders only, but until demonstrated, this seems too ready an answer, grounded in all the wrong reasons.

In the meantime, for the shorter run, a few firmer recommendations are possible. The appraisal remedy should not be extended except perhaps in demonstrable "no market" situations. The statutes were formal and conceptual in origin. They should be left that way and administered that way until they are reanalyzed and reworked as a whole. Efforts to make them symmetrical, efforts to view them functionally or administer them for their economic policy content cannot succeed; their formal character should be recognized and accepted. Where the courts have a chance, they should restrict the remedy; their instinct is right in holding the shareholders' nose to the procedural grindstone and holding his recovery to the market value. Legislative reform should concentrate on accelerating the procedures involved. Outright repeal of the statutes is probably politically unobtainable, so associated is the remedy with the image of a downtrodden minority, with the still slightly spooky arcana of "merger," and with traces of the notion that it is the "corporation" that counts rather than the enterprise. The one main function performed by these statutes must not be forgotten; they staved off injunctions. They may still be staving them off, though the need has declined.

Altogether, we can live along with the *status quo* under the appraisal statutes as they now are. They are in sickly condition. But in a world as awry as this one, they do not loom very important.

Some Closing Observations

The dissenter's appraisal statutes are not remarkable as material for the crusader or reformer. Their major interest is intellectual.

Here on a tiny glass slide one may see, if he looks, something of the chemistry of the law—the interplay of past and present, stability and mutation, ideology and policy, market and myth, cold analysis and warm justice, good sense and silliness, Realism (fourth century, B.C.) and Realism (twentieth century, A.D.), the cruciality of procedure, the needs of the practitioner, the demands of commerce, and the eternal political contest between the many and the few. It is a complex organism we view. One leaves the microscope suspecting that at times we must be content to live with inconsistency—and that at times the most formal answer will be the most functional answer.

Such things as these Frank Coker saw with a clear and constant eye and with a rare sense of comic proportion.

APPENDIX

Shareholder's Appraisal Statutes by Transactions Giving Rise to the Remedy

GROUP I: Jurisdictions where merger or consolidation is the only triggering transaction.

1.	Ark.	ARK. STAT. § 64-703 (1947).
2.	Cal.	CAL. CORP. CODE §§ 4123, 4300 to 18 (1955).

3.	Del.	DEL. CODE ANN. tit. 8, § 262 (1953), § 253(d)(e) (Supp. 1960).
4.	Ga.	GA. CODE ANN. §§ 22-1845 to 49 (Supp. 1961).
5.	Hawaii	HAWAII REV. LAWS §§ 173-19 to -30 (1955).
6.	Kan.	KAN. GEN. STAT. ANN. § 17-3707a (Supp. 1959).
7.	Miss.	MISS. CODE ANN. § 5351-03 (1956).
8.	Nev.	NEV. REV. STAT. §§ 78.505 to .520 (1956).
9.	P.R.	P.R. LAWS ANN. tit. 14, § 1906 (Cum. Supp. 1957).
10.	S.D.	S.D. CODE §§ 11.02A06-07 (Supp. 1960).
11.	V.I.	V.I. CODE ANN. tit. 13, § 256 (1957).

GROUP II: Jurisdictions in which a sale of substantially all the corporation's assets, in addition to merger or consolidation, is a triggering transaction.

1.	Ala.	ALA. CODE tit. 10, §§ 21(62), (73) (Supp. 1961).
2.	Alaska	ALASKA COMP. LAWS §§ 36-2A-97, -103 (Supp. 1951).
3.	Colo.	COLO. REV. STAT. ANN. § 31-4-9 (1953), § 31-31-13 (Perm. Supp. 1960).
4.	D.C.	D.C. CODE §§ 29-240, -927i (1951).
5.	Fla.	FLA. STAT. ANN. §§ 608.23, .30 (1956).
6.	Ill.	ILL. ANN. STAT. ch. 32, §§ 157.70, .73 (Smith-Hurd Supp. 1961).
7.	Ind.	IND. ANN. STAT. §§ 25-236, 240 (1960).
8.	Ky.	KY. REV. STAT. §§ 271.415, .490 (1960).
9.	Me.	ME. REV. STAT. ANN. ch. 53, § 85 (1954).
10.	Mich.	MICH. STAT. ANN. § 21.44 (1935), § 21.54(1) (Supp. 1961).
11.	Mo.	MO. ANN. STAT. §§ 351.405, .455 (1952).
12.	Mont.	MONT. REV. CODES ANN. §§ 15-912, -1905 (1947).
13.	N.J.	N.J. STAT. ANN. § 14:3-5 (1939), §§ 14:12-6, -7 (Supp. 1961).
14.	N.M.	N.M. STAT. ANN. §§ 51-2-31, 51-11-5, -6 (1953).
15.	N.D.	N.D. CODE ANN. §§ 10-20-07, -11 (1960).
16.	Ore.	ORE. REV. STAT. §§ 57.490, .516 (1961).
17.	R.I.	R.I. GEN. LAWS ANN. §§ 7-5-8 to -16 (1956).
18.	S.C.	S.C. CODE §§ 12-459 to -462, 12-633 to -635 (1952).
19.	Utah	UTAH CODE ANN. §§ 16-10-75, -76 (1953).
20.	Va.	VA. CODE ANN. §§ 13.1-75, -78 (1956).
21.	Wis.	WIS. STAT. ANN. §§ 180.69, .72 (1957).
22.	Wyo.	WYO. STAT. ANN. §§ 17-36.71, .72 (Supp. 1961).

GROUP III: Jurisdictions in which a charter amendment changing the purposes of the corporation, in addition to a sale of substantially all the corporation's assets. merger, or consolidation, is a triggering transaction.

1.	Mass.	MASS. ANN. LAWS ch. 156, §§ 46, 46E (1959).
2.	N.H.	N.H. REV. STAT. ANN. §§ 294:42, :76 (1955).
3.	Tex.	TEX. BUS. CORP. ACT art. 5.11 (1956).
4.	Vt.	VT. STAT. ANN. tit. 11, § 381 (1958).

GROUP IV: Jurisdictions in which a charter amendment changing the corporate purposes, extending the corporation's duration, or changing the rights of the holders of any outstanding shares, in addition to a sale of substantially all the corporation's assets, merger, or consolidation, is a triggering transaction.

1.	Idaho	IDAHO CODE ANN. § 30-156 (1948), § 30-150 (Supp. 1961).
2.	Wash.	WASH. REV. CODE § 23.01.450 (1951).

GROUP V: The following jurisdictions have unique combinations of triggering transactions in their appraisal statutes.

1. Ariz. ARIZ. REV. STAT. ANN. §§ 10-347, -363 (1956).
   a. Merger or consolidation.
   b. A distribution involving the exchange of the assets of one corporation for the stock of another.

2. Conn. CONN. GEN. STAT. REV. § 33-373 (1962).
   a. Consolidation or merger, except that shareholders of the surviving corporation are not given the remedy unless the merger amends their shares in a respect that entitles them to it.
   b. A general plan of liquidation and distribution substantially equivalent to a merger in which a corporation's assets are sold for the securities of another corporation, the remedy going to shareholders of the selling corporation only.
   c. Distributions to shareholders as co-owners of undivided interests in assets in kind.
   d. An offer made to a preferred class with arrearages to exchange its shares for other preference securities.
   e. A charter amendment making certain specified changes in preferred shares.

3. Iowa IOWA CODE ANN. §§ 491.25, .112 (1946).
   a. Merger or consolidation.
   b. A charter amendment extending the corporation's duration.

4. La. LA. REV. STAT. § 12.52 (1950).
   a. Merger or consolidation.
   b. Sale of assets.
   c. Any charter amendment which changes the corporate purposes, extends the corporation's duration, or changes the rights of the holders of any outstanding shares.

   But see, note 31 *supra*.

5. Md. MD. ANN. CODE art. 23, §§ 10, 73 (1957).
   a. Consolidation or merger, but objecting stockholders of the surviving corporation have no appraisal rights unless the merger alters their express contract rights and the charter contains no provision permitting the alteration.
   b. Sale of assets.
   c. Any charter amendment which affects contract rights or share preferences.

6. Minn. MINN. STAT. ANN. §§ 301.40, .44 (1947).
   a. Merger or consolidation.
   b. Any charter amendment which changes the corporate purposes or extends the corporation's duration.

7. Neb. NEB. REV. STAT. §§ 21-1,109-161 (1954).
   a. Merger or consolidation.
   b. Reclassification of any shares, the elimination of any previously authorized shares, or the authorization of any new shares.

8. N.Y. N.Y. STOCK CORP. LAW §§ 14, 38.11, 85.7, 87, 105.9 (1951), §§ 20, 91.7 (Supp. 1962).
   a. Consolidation or merger, but a shareholder of a corporation surviving a merger has an appraisal right only if his stock rights have been adversely altered.

b. Sale of assets.
c. Issuance of stock to employees in disregard of the stockholders' preemptive rights.
d. Any charter amendment which reclassifies stock rights.

9. N.C. N.C. GEN. STAT. §§ 55-101, -102, -108, -113, -119(b) (1960).
a. Merger or consolidation.
b. Sale of assets.
c. A general plan of liquidation or distribution in which the assets of one corporation are exchanged for the stock of another.
d. The acceptance by any stockholder of an offer to exchange preferred stock with arrearages for other preferential securities.
e. Any charter amendment which changes the corporation into a non-profit or cooperative organization or which would adversely affect preferential rights.

10. Ohio OHIO REV. CODE ANN. §§ 1701.17, .74, .80 (1953), §§ 1701.74, .76, .81, .83, .85 (Supp. 1961).
a. Consolidation or merger.
b. Sale of assets.
c. Any charter amendment which changes the corporate purposes, class preferences, or changes the corporation into a non-profit organization.

11. Okla. OKLA. STAT. ANN. tit. 18, §§ 1.157, .158 (1951).
a. Consolidation or merger.
b. Sale of assets.
c. A distribution of securities or assets in kind.
d. Any charter amendment which adversely alters classes of shares, changes the corporate purposes, or reduces the number of authorized directors.
e. A corporate reorganization.
But see note 31 *supra*.

12. Pa. PA. STAT. ANN. tit. 15, §§ 2852-311 (1958) (Supp. 1961), 2852-515 (Supp. 1961), 2852-810 (1958), 2852-908 (1958) (Supp. 1961).
a. Consolidation or merger, but a shareholder has no appraisal right when a wholly-owned subsidiary is merged with its parent unless his class rights in the stock of the parent are adversely affected.
b. Sale of assets.
c. Any charter amendment limiting or denying preemptive rights, or altering preferential rights.
d. Stockholders of a corporation which acquires all the property of another corporation by issuing shares or evidence of indebtedness have an appraisal right if the acquisition is accomplished by the issuance of more than a majority of the voting shares which will be outstanding immediately after the acquisition.

13. Tenn. TENN. CODE ANN. §§ 48-503, -510, -712 (1955), § 48-520 (Supp. 1962).
a. Consolidation or merger.
b. Sale of assets.
c. Any fundamental charter amendments or charter repeal.

Notes: (i) West Virginia is the only state having no provision for shareholder's appraisal rights.
(ii) This table is a thumbnail sketch only and omits much. It does not, for example, reflect the fact that some statutes restrict the remedy to limited classes or specially qualified groups of shareholders. See note 34 *supra*.